







## CASES DECIDED

IN

## THE COURT OF CLAIMS

OF

## THE UNITED STATES

DECEMBER 1, 1941, TO MARCH 31, 1942

MILH

REPORT OF DECISIONS OF THE SUPREME COURT IN COURT OF CLAIMS CASES

REPORTED BY

JAMES A. HOYT

VOLUME XCV

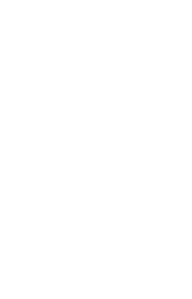
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GOVERNMENT PRINTING OFFICE WASHINGTON: 1942



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#### JUDGES AND OFFICERS OF THE COURT

-

Chief Justice Richard S. Whaley

Judges

J

BENJAMIN H. LITTLETON MARVIN JONES SAM E. WHITAKER J. WARREN MADDEN

WILLIAM R. GREEN \*

Samuel J. Graham Fenton W. Boote, Ch. J.
William R. Gueen

Commissioners of the Court

ISRAEL M. FOSTER 1 RICHARD H. AKERS
HAYNER H. GORDON C. WILLIAM RAMSEYER
EWARY W. HOBBS MELVILLE D. CHURCH 2

Herbert E. Gyles Auditor and Reporter

JAMES A. HOYT

Secretary
WALTER H. MOLENO

Chief Clerk Assistant Clerk

WILLARD L. HART JOHN W. TAYLOR

JERRY J. MARCOTTE

Assistant Attorneys General

(Charged with the defense of the Government)

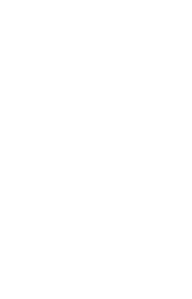
Francis M. Shea Samuel O. Clark, Jr. Norman M. Littell

\*Judge Green recalled to sit, hear, and determine all questions which

may arise in cases heard by him.

Retired as of March 31, 1942.

Resigned as of March 31, 1942.
Resigned as of March 31, 1942.



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#### LEGISLATION RELATING TO THE COURT OF CLAIMS

[Private Law 306-77th Congress] [CHAPTER 122-2D SESSION] [H. R. 4179]

AN ACT To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or nersonal representatives, against the United States, as described and in the manner set out in section 2 hereof which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

SEC. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid. but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pone in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" or "pay" line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of XIX

dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

SEC. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pone against the United States, numbered K-366, in the Court of Claims,\* together with any

additional evidence which may be taken. Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act. a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

Approved, February 27, 1942,

\*See 76 C. Cls. 64; 81 C. Cls. 658; 86 C. Cls. 18; 303 U. S. 654,

certiorari denied.

### CASES DECIDED

#### IN THE COURT OF CLAIMS

December 1, 1941, to March 31, 1942

#### THE NEZ PERCÉ TRIBE OF INDIANS v. THE UNITED STATES

INc. K-107. Decided October 6, 1941 : Pisintiff's motion and defendant's motion for new trial overruled, January 5, 1942]

#### On the Proofs

Indian claims: treatics of June 11, 1855, and June 9, 1863; alleged failure to pay amounts due; duty of sovereign,-Phintiff sucd the defendant for \$3,288,828.22, hosing its claims on four items; (1) Failure to pay to the tribe the amount received from the sale of lands within what is known as the "Old Agency

Reserve" or the "Langford Claim"; (2) Fallure to pay to the tribe money received from the sale of lands allotted erroneously to nonmembers of the tribe

and later cancelled: (3) Per capita payments erroneously made to nonmembers

of the tribe: (4) For gold mined and removed by ponmembers of the tribe from lands alleged to be within the plaintiff's reservation.

The case was before the Court under Rule 89(a), and it was held: (1) That plaintiff was not entitled to recover the amount received from the sale of, or for the value of, the lands in

the "Old Agency Reserve" which were purchased by the defendant (2) That plaintiff was entitled to recover the value of the number of acres of cancelled allotments which were opened to homestead entry by the proclamation of the President on November 8, 1895 (29 Stat. 873,876), with interest at 5 per-

(3) That plaintiff was entitled to recover whatever part of the \$1,626,222 was paid to nonmembers of the tribe and for which the defendant has not accounted to the plaintiff, with interest at 5 percent per annum.

cent per annum.

Reporter's Statement of the Case

(4) That plaintiff was not entitled to recover the value of
any gold removed from its reservation.

Remer, no guarantee to exclude nonnembers of tribe.—Where there is no allegation that white people went upon plaintiff is lands at the direction of the defendant, or even at defendant's neighbor, and where liability is predicted soldy on the defendant's failure to keep out said white persons; it is hadden that from the language of the treaty of 1855 it cannot be inferred that the defendant intended to guarantee that no white men should readen on said recoveration and that defendant the state of the said o

Consider the property of the profit.

State of the profit of the profit of the profit of the sovereign property of the profit of the sovereign proper was under the day of protecting the sovereign proper was under the day of protecting the plaintiff in the pearents conquastion and possession of its property but this day pose no further than to use its forces to endouve to prevent a threatened wrong and to afford plaintiff redress in its courts against the wrongless committed.

#### The Reporter's statement of the case:

Mr. F. M. Goodwin for the plaintiff. Mesers. Lawrence Cake, C. C. Dill, and G. W. Jewett were on the briefs.

Mr. Walter C. Shoup, with whom was Mr. Assistant Attorney General Norman M. Littell, for the defendant. Mr. Raumond T. Nagla was on the briefs.

The court made special findings of fact as follows:

 Plaintiff's petition is filed under the authority of an act approved February 20, 1929 (45 Stat. 1249), conferring jurisdiction on this court "to hear, determine, adjudicate, and render final judgment" on plaintiff's claims as set out in the act.

2. The New Percé Tribe of Indians originally occupied an area in what is now northwestern Idaho, northeastern Oregon, and southeastern Washington, on the lower Snake River and its tributaries, between the Blue Mountains of Oregon and the Bitter Root Mountains of Idaho, a part of which area was ceded and the remainder reserved by them by their first treaty of June 11, 1855 (19 Stat, 987).

3. By the treaty of June 9, 1863, ratified April 17, 1867 (14 Stat. 647), the Nez Percé Tribe ceded their reservation under the treaty of 1855, supra, except a portion thereof which was set apart as their diminished reservation.

1 Reporter's Statement of the Case

 An agreement between the United States and the Nex Percé Tribe of Indians was concluded on May 1, 1898, and ratified by Congress on August 15, 1894 (28 Stat. 286, 826– 331; Sen. Ex. Doc. No. 31, 53rd Cong., 2d sess., pp. 19–25, Cong. Doc. Series No. 310).

Under the terms of this agreement all of the unallotted lands were ceded with certain reservations, among which was a tract of land described as follows:

as a tract of land described as follows:

\* \* \* Also that there shall be reserved from said cession the land described as follows: "Commencing at a point at the margin of Clearwater River, on the south

she thereof, which is three hundred yards falser where the middle thread of Lapvais (creek empties into said river; run thence up the margin of said Clearwater. The control of the control of the control of the control run thence south two hundred and fifty yards to a point; thence southwesterly, in a line to the southeast corner of a stone building, partly finished as a chench; and point northerly in a straight line to the point of leagining; " " "

These lands were purchased by the United States upon the performance of the conditions specified in the agreement.

performance of the conditions specified in the agreement.
5. In arriving at the prece to be paid for the lands code
by the agreement of 1806, the parties calculated that the total
conditions are preceded to the precedent of the paid to the lands code
to the paid to the

6. Under the terms of the agreement of 1893 the consideration to be paid for the lands ceded was to be paid to members of the plaintiff tribe per capits. Some portion of the funds distributed prior to the cancellation of the errone.

ous allotments was distributed to persons who were not members of the plaintiff tribe.

95 C. Cla.

7. In 1800 gold was discovered on lands alleged to be within the lands reserved by the treaty of 1885. White men undertook to locate cumps thereon and to extract the gold. White men the lands, but these efforts were unuscensful. Several camps were established and a large quantity of gold was extracted before execution of the agreement of 1880 ceding to the defendant all unalbutted lands, with certain reservations, the plantiff tries and the superintendent and segret.

The court decided that the plaintiff was entitled to recover the value of the number of acrees of cancelled allottements which were opened to homestead entry by the predomation of the President on November 6, 1805 (29 Stat. 673-876), which was a prevent per annuar, that plaintiff was are related to the prevent per annuar, that plaintiff was not added to monoments of the tribe and for which the defendant has not accounted to the plaintiff, with interest at 5 percent per annuar, and that plaintiff was not entitled to recover the amount received from the sale of cr for the value of the lands in the OlA Agency Roserve which were purchased by the defendant; and that plaintiff was not entitled to recover the value of any gold removed from its research

Whiteher, Judge, delivered the opinion of the court: The plaintiff sugs the defendant for \$3.966.826.92, basing

it claim on four items; (1) the failure to pay to the tribe amount record from the sate of lands within what is known as the "Old Agency Reserve" or the "Langford from the sate of lands within what is known as the "Old Agency Reserve" or the "Langford the Calina;" (2) failure to pay to the tribe money received from the sate of lands albeted ereneously to nonmembers of the tribe money to consider the country of the consumers of the tribe; (4) for god lained and removed by nonmembers of the tribe; (4) for god lained and removed by nonmembers of the tribe; (4) for god lained and the constraint of the c

The case is before us under rule 39 (a).

## Opinion of the Court

#### First Item

On June 11, 1855, a treaty between the parties was agreed upon, later raified on March 8, 1899 (19 Sett. 87), under the terms of which a certain reservation was set apart to the plaintiff, and under which plaintiff, and under which plaintiff, relinquished its was negotiated to all other lands. Later, in 1883, a treaty was negotiated between the parties, unfaired on April 71, 1807 (18 Sett. 671), and the second section of the section of the second section of the section o

Finally, in 1863 an agreement was entered into between the parties, which was ratified by the Congress on August 15, 1894 (28 Stat. 286, 293-393), under which the plaintiff ceded to the defendant all of its unallotted lands, with certain reservations, for a consideration of \$1,805,922. Among the lands reserved from the cession was a tract described as follows:

Also that there shall be reserved from said cossion the land described as follows: "Commencing at a point at the margin of Cherwater River, on the south side thereof, which is three hundred yards blow where the source of the control of the contro

the point of beginning; \* \* \*

The plaintiff alignes that these lands were later sold by the
United States and the proceeds thereof were deposited in the
United States and the proceeds thereof were deposited in the
general funds of the Treasury of the United States, and it
is alleged that the plaintiff has received no compensation
tiff is not entitled to recover on this item, because in the
tiff is not entitled to recover on this item, because in the
that the United States shall purchase them upon provided
that the United States shall purchase them upon provide
conditions, whereupon the right of occupancy of the trible
in the land "shall terminate and cases and the complete title

thereto immediately vest in the United States." The lands were purchased by the United States, the condition having been complied with, and upon their purchase, in accordance with the agreement, the right of occupancy of said Indians in said described tracts terminated and ceased and the complete title thereto immediately vested in the United States.

#### Second Item

By the treasty of 1983 the plaintiff relinquished to the United States all the lands previously reserved for their use and occupation by the treaty of 1955, except a certain described tract. This tract was reserved for them, "for a home, and for the sole use and occupation of said trink-" for treaty provided for a survey of the lands and for the allotment of 20 tillable acress thereof to each make premo of twenty-one parar or over. These allotments were to be "setapart for the perpetual and exclusive use and benefit of such "residue of the land brebly reserved shall be held in common for pasturage for the sole use and benefit of the Indians."

After these, and operhaps other, allotments had been made,

the plaintiff and the defendant entered into the agreement of 1980, under the terms of which the plaintiff coded to the of 1980, under the terms of which the plaintiff coded to the defendant "will the wouldstoff hands within the limits of said that of the allotted lands not soil IndySe28 seres has been errossously allotted to persons who were not members of the Nex Peret sirtle. Accordingly, these allottents were were cancelled, \$200.04 serves were reallotted to members of the Nex Peret sirtle. Of the halance, \$500.07 acres were yearnested on homestead entries, \$450 acres were set spart for the Conigl's Domain Chain, and \$150.08 acres are yearnetted on breasted entries, \$450 acres were set spart for the Conigl's Domain Chain, and \$150.08 acres are year-inmenta, except those which were reallotted to members of the Now Peret sirtle.

We are of opinion that plaintiff is entitled to recover on this claim. The only lands ceded to the defendant by the plaintiff were the "unallotted" lands. The 10,542.68 acres had been allotted, although erroneously, and, therefore, were

# Opinion of the Court not included in the cession. Title to these lands never passed from the plaintiff to the defendant. When these allotments

were cancelled, title to the lands, therefore, reverted to the plaintiff, their original owner.

If there could be any doubt that these erroneously allotted lands were not ceded, the negotiations between the Indians

lands were not ceded, the negotiations between the Indian and the defendant's commissioners leave no question about it. Throughout the negotiations they speak only of the unal-loted lands. Nowhere is there a suggestion that any part of the allotted lands should be ceded. There was no suggestion that some of them may have been erroneously allotted, and, therefore, no exception of these from the lands retained by the oldering the contraction of the source of the contraction of the testing the contraction of the testing the contraction of the

On the sixth day of council one of the Indians requested the commissioners to "bring the amount of the number of

the commissioners to "bring the amount of the number of acres on the reservation before allotment was made and also the amount of land that has been allotted to the Indiana," "Then," it was said, "we can find out how much there is on the outside of the allotments." The following day the com-

the outside of the allotments." The following day the commissioners reported as follows (Senate Ex. Doc. 31, p. 47):

Acres
The reservation contains.

76 988

| 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234 | 186, 234

For these the commissioners originally proposed to pay a price of \$2.50 an acrs, but, after seven days of meeting in council, on the eighth day they finally agreed to pay \$3.00 an acrs. The price paid at \$3.00 an acrs was for 562,074 acres, a total of \$1,668,6292. This was the entire acreage in the reservation, except \$2.560 acrss reserved for timber lands and the 1899 \$24, arcs that had been alleted, which included

acres, a total of \$1,686,822. This was the entire acreage in the reservation, except \$2,660 acres reserved for timber lands and the 189,234 acres that had been allotted, which included the 10,692.68 acres that had been erroneously allotted. It follows that the Government did not acquire and did not pay for these 10,842.68 acres. On November S, 1886, the President issued a proclamation which, after reciping the cession of 1883, declared "that all of the unallotted and unreserved lands acquired from the Nez Percis Indians, by axid agreement, will, at and after the hour of 12 celock, noon, (Pacific Standard time) on the 18th 400 of November 1866 and not before, be opened to attellment. \* \*\*\* The pro-clamation recited that the lands to a opened for a tettlement were particularly described in a schedule attached. This achedule is not before us, but it is excited the attached. This achedule is not before us, but it is evident it included the acregain (quastron because the appear visites it included the acregain (quastron because the appear that of this acregae 5,807.5 acres have been patented in homested anticing.

This proclamation of the President was an expropriation of these lands for the benefit of the defendant, both the acreage later disposed of and the veacual land, for which the plaintiff is entitled to a money judgment under the jurisdictional act (45 Stat. 1349) conferring jurisdiction on this court to adjudicate—

\* \* all legal and equitable claims of whatsoever nature \* \* arising under or growing out of the original Indian title \* \* including all title, claim, or rights growing out of [the treaties above mentioned] \* \* and more particularly as to the following claims: \* \* the particularly as to the following claims: \* \* the particularly as to the following claims: \* \* the particularly as to the following claims: \* \* the particularly as to the following claims: \* \* the particularly as to the following claims: \* \* the particularly as to the following claims: \* \* the particularly as to the following claims: \* \* the particularly as the particular the particular than the

Claim for certain lands included in canceled allotments \* and thereafter disposed of by the United States, said lands not being included in the area ceded by said treaties or said agreement of May 1, 1883. \* \*

#### Third Item

Under the agreement of 1883 the defendant was obligated to pay to the individual members of the Ner Percé Tribe the \$1,056,252 agreed to be paid for the lands ceded under the agreement. Plaintiff asys that \$41,500,50 of this amount was paid to persons not entitled thereto because the allotments of land to them had been erroneously made, because made to nonmembers of the tribe, and were later cancelled.

By article III of the agreement of 1893, it was provided that the consideration of \$1,626,222 for the ceded lands should

be paid to the plaintiff Indians per capita. If some part of the money for distribution has been paid to nonmembers of the tribe, the plaintiff, of course, is entitled to recover it. In many instances, however, it is not clear from the report of the General Accounting Office, which is the only proof on this feature of the case, that the payments set out were nayments to nonmembers of the tribe or their representatives.

As the case is submitted under rule 39 (a) it is not necessary for us to determine at this stage of the proceeding the amount paid to nonmembers of the tribe.

#### Fourth Item

Lastly, the plaintiff sues for the value of gold alleged to have been removed from the reservation by white people prior to the agreement of 1893. Plaintiff relies on the following portion of article II of the treaty of 1855, later reaffirmed by the agreement of 1893, which reads: All which tract shall be set apart, and, so far as neces-

sary, surveyed and marked out for the exclusive use and benefit of said tribe as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian department, he permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent; \* \* \*

There is no allegation that white people went upon plaintiff's lands at the direction of the defendant or even at its instigation. Liability is predicated solely on the defendant's failure to keep them out. The purpose of the above provision was to set apart abso-

Intely the lands described for the exclusive use and benefit of the plaintiff. The second clause, that no white man should be permitted to reside on the reservation, was inserted only to emphasize the statement in the first clause that the lands were set apart "for the exclusive use and benefit of said tribe." We are clearly of opinion that no intention can be suthered therefrom that the defendant intended to guarantee that no white man should reside thereon and that it should respond in damages if they did.

Independent of treaty, the defendant as the sovereign power was under the duty of protecting the plaintiff in the

Opinion of the Court peaceful occupation and possession of its property; Cherokee Nation v. Hitchcock, 187 U. S. 294; but this duty, of course, goes no further than a duty to use its forces to endeavor to prevent a threatened wrong and to afford it redress in its courts against the wrongdoer if the wrong is committed. No one has ever asserted that because a person's rights are invaded by a stranger the sovereign is liable in damages for a failure to afford adequate protection. Cf. Choctaw and Chickasaw Nations v. United States, 75 C. Cls. 494. This is true even though the sovereign be grossly negligent in failing to afford the necessary protection against the threatened danger. The sovereign is not liable for failure to perform a governmental function. Gianfortone v. City of New Orleans, 61 Fed. 64; City of New Orleans v. Abbagnato, 62 Fed. 240, 245-246; Campbell v. Montgomery, 53 Als. 527; Western College v. Cleveland, 12 Ohio St. 375; Louisiana v. New Orleans, 109 U. S. 285, 291, concurring opinion by Mr. Justice Bradley; and other cases collected in 13 A. L. R. 751.

29 A. L. R. 207, and 44 A. L. R. 1138.
We are satisfied that it was not intended by the treaty to impose on the defendant any greater duty to protect plaint if in the pescelful occupation and possession of its property than already existed. Certainly there was not expressly assumed an obligation to respend in damages, if the protection afforded was insdequate; nor will such an obligation to foregened in damages, the protection afforded was insdequate; nor will such an obligation for foresence-like, 40 bits. 56,05; Western College v. Clemetand, supra, Glassifortion v. New Orleans, supra. The treaty says that white persons shall not be permitted to reside on the reservation, but it does not say that if they do the United

In Leiphton v. United States, 161 U. S. 291, 296, the court considered the liability of the United States and the Indian Tribe for depredations. It said that the obligation assumed by the Indians under treaty "to case all hostilities against the persons and property of its [United States] citizens," was a promise "to keep the peace, and not a promise to pay if the peace is not kept." Here the United States said that white persons would not be permitted to reside on the reser-

#### Syllabur

vation, but it did not agree to pay damages inflicted if they did so. Cf. Blackfeet, et al. Nations v. United States, 81 C. Cls. 101, 119-123.

The agreement was intended to do no more than to make it as plain as possible that the reservation was intended for the sole use and benefit of the tribe and that the defendant would do what it could to effect that, or, failing in this, to afford plaintfir federse in its courts against the wrongdeer. We are of opinion the plaintiff is not entitled to recover on this item.

It results that the plaintiff is entitled to recover the value of the number of acres of cancelled allotments which were opened to homestead entry by the proclamation of the President an November 5, 1985 (99 Stat. 873-876), with interest at 5 percent per annun; that plaintiff is entitled to recover whatever part of the \$1,085,292 was paid to nonemothers of the tribe and for which the defendant has not accounted to the plaintiff, with interest at 5 percent per annun; that plaintiff is not entitled to recover the amount received from Newer which were purchased by the defendant, and that plaintiff is not entitled to recover the value of any gold removed from its receivation. It is no ordered.

Madden, Judge; Jones, Judge; Lettleton, Judge; and Whalet, Ohief Justice, concur.

#### JOSEPH'S BAND OF THE NEZ PERCÉ TRIBE OF INDIANS v. THE UNITED STATES

[No. L-194. Decided October 6, 1941. Plaintiff's motion for new trial overruled January 5, 1942]

#### On the Proofs

Indian claims; treaty of 1855; title to load included in reservation.— Where, on June 11, 1805, a treaty was concluded between the defendant and the New Perco Trible of Indians, by which much of the land of the tribe was ceded to the defendant, the land not coded being expressly see uside as a reservation for the add

#### Syllabus tribe; and where said treaty was signed on behalf of the Indiana

by Principal Chief Lawyer and the chiefs of the various hands, including Joseph, the chief of the plaintiff hand, who was the third Indian signer; and where the land claimed in the instant suit was included in the Nex Perce reservation of said treaty; it is held that there was nothing in said treaty of 1855 which either recognized any title in plaintiff hand to or gave to that band or any other band title to, specific norts

of the land reserved to the Nez Percé tribe by said treaty. Bame: authority of tribal chief to sign treaty.-The conduct of the then chief of the plaintiff band, the elder Joseph, in participating in the negotiations and signing the treaty of 1855 shows that there must have been power in the tribe to act as a whole with reference to all lands of the tribe or of any of its bands.

Same: immemorial possession.-Where claim of title to the Wallowa area is based on alleged immemorial possession by pinintiff band, it is held that it does not appear from the evidence that Joseph and his band ever had exclusive possession of said Wallows area.

Same; treaty of 1863; dissenting minority bound by action of tribe.-Where in 1863 a treaty with the Nez Perce Indians was signed. reducing the reservation to a described area, and where in said treaty the land claimed in the instant suit, known as the Wallows reservation, was included in the land relinquished to the defendant by the tribe; and where Joseph, the then chief of the plaintiff bond, refused to sign said treaty or to recognize it is hinding; it is held that the Nez Perce tribe, as an cutity, had the power to make the said treaty of 1863 and that the dissenting minority including the members of the plaintiff hand, was bound by said treaty.

Same; recognition of title,-Where in 1873 upon the recommendation of the Commissioner of Indian Affairs the President, by Executive Order, withdrew from entry the Wallows area and set it saids as a reservation for the "roaming New Perce Indians": and where, however, the nontreaty Nez Perce Indiana continued to room and made no attempt to establish permanent homes in the Wallowa reservation; and where in 1875 the President thereupon revoked his order of 1873 and

restored to the public domain the said area: it is held that anid Executive Order of 1873 was not a recognition of a title then existing in plaintiff hand. Same; alternative claim not in petition .- Plaintiff's alternative claim for relief, the right to a pro rata share of the Nex Percé income and property under the treaties and agreements of the tribe with the United States, not having been set forth in plaintiff's petition was not properly before the court.

# 11 Reporter's Statement of the Case

The Reporter's statement of the case:

The Reporter's statement of the case:

Mr. F. M. Goodwin for the plaintiff. Mesers. F. W. Clements, Lawrence H. Cake, C. C. Dill, and G. W. Jewett were on the brief.

Mr. Walter C. Shoup, with whom was Mr. Assistant Attorney General Norman M. Littell, for the defendant, Mr. Raymond T. Nagle was on the brief.

The court made special findings of facts as follows:

1. This suit was filed pursuant to an act of Congress of February 20, 1929, 45 Stat. 1249, which so far as here material, reads as follows:

That jurisdiction is hereby conferred on the Court of Claims, with the right of appeal by either party to the Supreme Court of the United States, notwithstanding lapse of time or statutes of limitation, to hear, determine, adjudicate, and render final judgment on all legal and equitable claims of whatsoever nature of the Nez Perce Tribe of Indians in Idaho, or of any band thereof, against the United States, arising under or growing out of the original Indian title, claim, or rights of the said Indian tribe or any band thereof. including all title, claim, or rights growing out of treaties of June 11, 1855 (Twelfth Statutes, page 957), and June 9, 1863 (one hundred and forty-eighth Statutes, page 673),1 and an agreement of May 1, 1893, approved by Act of Congress of August 15, 1894 (Twenty-eighth Statutes, page 286), with the said Nez Perce Tribe or band of Indians, in connection with the Nez Perce Indian Reservation in the States of Idaho

and Oregon, \* \* \*
Sec. 2. Any and all claims against the United States
within the purriew of this Act shall be forever harred
unless unit or suits be instituted or petition, subject to
perfect the property of the property of the property
pears from the date of this Act, and in any such suit
or suits said New Perce Tribe of Indians, or any band
thereof, shall be party or parties plaintiff and the
United States shall be the party defendant. The pettion of the said Indians shall be verified by the attorclaims, under counted with the Indians, amorrowed in
claims, under counted with the Indians, amorrowed in

So in original. Reference is to 14 Stat. 647, 449973—42—CC—vol. 25——3

accordance with existing law, upon information and belief as to the facts therein alleged and no other vericulture of the second second second second second nearly, records, maps, historical works, and affidavits in fortial files, or certified copies thereof, may be used in evidence and the departments of the Government shall be such treatise, papers, maps, correspondence, reports, documents, or affidavits as they may require in the prosecution of any suit or suits instituted under this prosecution of any suit or suits instituted under this

SEC. 4. Any bands of Indians associated with the Nez Perce Tribe deemed necessary to a final determination of any suit or suits brought hereunder may be joined therein as the court may order: Provided, That upon final determination of the court of any such suit or suits the Court of Claims shall have jurisdiction to fix and determine a reasonable fee not to exceed 10 per centum of the amount recovered, or in the event of any compromise settlement and adjustment of any of the foregoing claims by the Commissioner of Indian Affairs and the Secretary of the Interior, then such officers shall have jurisdiction to fix and determine a reasonable fee not to exceed 10 per centum of the amount secured in such settlement or adjustment, to be paid to the attorney or attorneys employed as herein provided, and such fees shall be paid out of any sum or sums adjudged to be due said tribe or bands, or any of them, and the balance of such sum or sums shall be placed in the Treasury of the United States to the credit of such tribes or bands where it shall draw interest at the rate of 4 per centum per annum. The amount of any judgment shall be placed in the Treasury of the United States to the credit of the Nez Perce Tribe of Indians and shall draw interest at the rate of 4 per centum per annum and shall be thereafter subject to appropriation by Congress for educational. health, industrial, and other purposes for the benefit of said Indians, including the purchase of land and building of homes, and no part of said judgment shall be paid out in per capita payments to said Indians.

2. The Nez Perce Tribe of Indians originally occupied an area in what is now northwestern Idaho, northeastern Oregon, and southeastern Washington, on the lower Snake River and its tributaries, between the Blue Mountains of

Oregon and the Bitter Root Montains of Idaho. The Nex Perces all spoke the same hanguage. They were cometimes classed under two geographical divisions, Upper Nex Perces and Lower Nex Perces. The tribe was divided into a number of hands. Until 1892 there was no head chief of the tribe, but each band had several chiefs, of whom one was regarded as the header of the band. One of the bands of Nex graded and the select of the band. One of the bands of Nex percent and the selection of the selection of the selection of the fatter the older Chief Joseph, who was their chief in 1850, and who was succeeded after his death in 1811 by his son.

3. In 1892 the Indian Agent appointed an Indian known as Ellias absed hidr of the whole Ner Perc Tribs. Some time after the death of Ellis, but prior to 1885, the chief of one of the banks, known as Lawyer, was appointed head chief by the Indian Agent. Lawyer was recognized as head chief by the Indian Agent. Lawyer was recognized as head chief both by the defendant and the Tribe when the treaty of 1800 was negotiated and signed, but some of the contract of 1800 was negotiated and signed, but some of the chief of 1800 was negotiated and signed, but some of the chief of 1800 was negotiated and signed, but some of the chief of 1800 was negotiated and signed, but some of the chief of 1800 was negotiated and signed, but some of the chief of 1800 was negotiated and the first of 1800 was negotiated and signed, but some of the signed and t

also known as Chief Joseph.

Chief Joseph the elder had contended unsuccessfully against Lawyur for the office of head chief, but he took part in the negotiations and was the third Indian signer of the Treaty of 1885. He also attended the councils at which the Treaty of 1885 was negotiated, but refused to sign the treaty, as did some other prominent and some less prominent chiefs. A. Treaties were concluded between the defendant and the

Nez Perce Indians on June 11, 1865 and June 9, 1863. The Nez Perce Reservation, as described by the Treaty of 1855, included the Wallowa Valley. It was not included in the reservation as described by the Treaty of 1863, but was a part of the inands ceded to the defendant by that treaty. The reservation created by the treaty of 1863 was a relatively small area of Indian in what is now the state of Idaho.

5. The Wallowa Valley Reservation land, as described in finding 7 and as claimed by plaintiff band, never was the permanent home nor in the exclusive possession of Joseph and his band. At different times they had their peculiar home upon small portions of the land claimed, along the Imnaha River, on the Grande Ronde River near its mouth.

95 C. Cls.

Reporter's Statement of the Care

as well as upon land not herein claimed, vir, on the Snake River at the mouth of the Salmon River. Plaintiff band, in common with other Nex Perces resorted to the valley of the Wallowa River and the adjacent country, within what became a part of the reservation land under the Treaty of 1855, in the summer to fish, hunt, gather herbs and roots, and graze their herds.

grass there needs only the silter and the head chiefs of orth chocked loops by the silter and the head chiefs of orth chocked loops and the chocked loops are designed to sign the Treaty of 1888, the Nex Perre tribe divided into two factions, the treaty and the nontreaty parties. The latter party was led by Chiefs Joseph, Looking Glass, Big Thunder, White Birk, and Engle From the Light, who with their bands refused to recognize the treaty or to remove the diminished reservation. They became known as the roaming or rowing New Perces Indians. Following an internating or rowing New Perces Indians. Following an inreservation was deemed intranctional, their removal to the reservation was deemed intranctional.

7. A departmental recommendation was submitted to the President and an Executive Order was issued in the following terms:

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
June 9, 1873.

The above diagram is intended to show a proposed reservation for the roaming Nez Perce Indians in the Wallowa Valley, in the State of Oregon. Said proposed reservation is indicated on the diagram by red lines, and is described as follows, viz:

Commencing at the right bank of the mouth of frunds Ronds River; there up Snake River to a point due exist of the southeast corner of township No. 1, No. 46 cast of the Willamette meridian; there from said point due west to the West Fork of the Wallowa Kwr; thence down said West Fork to its Junction with the Wallowa River; thence down said river to its coutable of the Wallowa River; there down said river to its could be a support of the wallow of the Wallowa has a support of the Wallowa River; there down said river to it to last-named river to the place of beginning.

I respectfully recommend that the President be requested to order that the lands comprised within the above-described limits be withheld from entry and Reporter's Statement of the Case settlement as public lands, and that the same be set apart as an Indian reservation, as indicated in my

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report to the department of this date.

Edward P. Smith, Commissioner.

DEPARTMENT OF THE INTERIOR,

June 11, 1873.

Respectfully presented to the President, with the recommendation that he make the order above proposed

recommendation that he make the order above propose by the Commissioner of Indian Affairs. C. Delano, Secretary.

Executive Mansion, June 16, 1873.

It is hereby ordered that the tract of country above

described be withheld from entry and settlement as public lands, and that the same be set apart as a recommended by the Secretary of the Interior and the Commissioner of Indian Affairs.

U. S. Graser.

O. D. GRANT.

8. During the period between June 16, 1873, and June 19, 1876, when the Executive Order of 1878 was in force, neither Chief Joseph's band nor any other nontreaty bands of New Percess settled in the Wallowa Reservation. They continued their former roving over the country, including Wallowa Valley. The purpose of the Executive Order having failed, the Indian Chief of the Percentified Chief of June 10, 1875, which reach as follows:

EXECUTIVE MANSION, June 10, 1875.

It is hereby ordered that the order, dated June 16, 1873, withdrawing from rule and settlement and setting apart the Wallawa Valley, in Oregon, described as follows: \*\* \* "as as Indian reservation, is hereby revoked and annulled; and the said described tract of

country is hereby restored to the public domain.

U. S. Grant.

 Following the Executive Order of 1875, the Wallowa lands having been restored to the public domain, white settlers moved in and serious conflicts between them and the Indians followed, with fatalities on both sides. General Howard, commanding a division of the United States Army, was directed to remove the roving New Perces, by force if necessary, to the tribal reservation as defined by the Treaty of 1988. In May 1987, councils were held with Chief Joseph the younger, the son of and successor to Chief Joseph the deler who had died in 1987, and with Chief Locking Glass and White Bird, who agreed that their bands would remove the reservation peacashly. However, before this was done, further fatal conflicts occurred, the soldiers attached done, further fatal conflicts occurred, the soldiers attached the following the following

were finally removed, about one-half to the Nez Perce Reservation in Idaho, and the remainder to the Colville Reservation in Washington. Joseph elected to go to Colville. 10. Plaintiff band, as such, was not a party to and was not intended to have benefits under treaties or agreements be-

tween the defendant and the Nez Perce Indians.

11. It is not proved that members of plaintiff band were, as such, denied the benefits of treaties or agreements between

the defendant and the Nez Perce Indians.

12. It is not proved that any member of plaintiff band, as such, failed to receive benefits under treaties or agreements except by his voluntary refusal to accept such benefits.

The court decided that the plaintiff was not entitled to

Mappen. Judge. delivered the opinion of the court:

This suit is brought by plaintiff band of the Nee Pere Tribs of Indians under a special set of Congress (set out in finding 1), conferring jurisdiction on this court to determine the chains of the Nee Peres Tribe of Indians, or any band thereof, arising under or growing out of the original Indian titls, chain or right, including all legites of the property of the property of the property of the Flaintiff's claim is that it was the exclusive owner of a track known as the Wallows Valley, in what is now the State of Oregon, and that it was desprived of that hand by the defendant without its consumt and without compensa-

# Opinion of the Court

tion. The claimed land is much more than the valley of the Wallowa River, as it includes all the land described in the Executive Order setting up the Wallowa Valley

reservation hereinafter discussed.

The Ner Perez Tribe of Indians was made up of several separate bands, each with its own chief or chiefs. Geo-graphically, they were divided into the Upper Nev Perces and the Lower Nez Perces. Joseph's Band, so named after its chief at the item that the treatise here of interest were made, belonged to the Lower Nez Perces. This band at different times deviat long the Salmon and Snake Bivers, on the Imnaha, and on the Grande Ronde near its month. They, with other Nez Perces, recorded to the valley of the

Wallows River and to nearby country in the summer for hunting, fishing, and grazing.

Until 1842 there had been no chief of the whole tribe.

In that year an Indian known as Ellis was named head chief by the Indian agent for the tearritors.

chief by the Indian agent for the territory. Some time prior to 1855 an Indian named Lawyer had come to be recognized as head chief by most of the tribe and he was so treated by the Government's commissioners in negotiating for the treaties of 1855 and 1863. On June 11, 1855, a treaty was concluded between the de-

for the treaties of 1855 and 1863.

On June 11, 1865, a treaty was concluded between the defendant and the Nee Perco Tribe of Indians, by which much lead to the property of the property of the property of the land not ceeded being expressly reserved for a signed on behalf of the Indians by Lawyer and the chiefs of the various bands, including Joseph who was the third Indians signer. In the land of the Indians by Lawyer and was included in the Nee Perco Training to the Perco P

In 1865 another treaty with the Nee Perce Indian vasigned, reducing the areas of the reservation to a described area in what became the State of Idaho. Included in the land reliquishing to the defendant by that treaty was the land described in the findings as the Wallowa reservation. Joseph refused to sign the treaty or to recognize it as bindought refused to sign the treaty or to recognize it as bindother chiefs to act for the participation. Lawyer or the other chiefs to act for the New York Control of the other chiefs to act for the New York Control of the followers of some other chiefs who had not agreed to the Opinion of the Court

95 C. Clk.

treaty refused to move to the treaty reservation and continued to roam over the country as they had previously done. In 1873, upon recommendation of the Commissioner of Indian Affairs, the President, by executive order, withdrew from entry the Wallowa area and set it aside as a reservation for the "roaming Nez Perce Indians." However, the nontreaty Nez Perces continued to roam and made no attempt to establish permanent homes in the Wallowa reservation.

In 1875 the President revoked his order of 1873 and restored the land covered by it to the public domain. After the revocation in 1875 of the order reserving Wallows from entry, white settlers moved in and conflicts ensued, with fatalities on both sides. Efforts were made to induce the younger chief Joseph, who had succeeded his father, and his band to move to the reservation of the 1863 treaty. These efforts seemed to be about to succeed when further fatalities occurred, defendant's troops intervened,

and open war followed. The Indians were finally captured in Montana in 1876, and were taken first to Oklahoma, and then in 1885 some to the Nez Perce Reservation in Idaho and some to the Colville Reservation in Washington. Plaintiff's contentions here are that Joseph's band owned

the Wallowa area, that plaintiff's title was recognized by the treaty of 1855, that the treaty of 1863 could not and did not lawfully deprive it of its property because it did not consent thereto, and that it is entitled to compensation for the land taken; or in the alternative, that in the treaty of 1855 it obtained recognition of its title and surrendered the title to the Nez Perce Tribe generally, so that the tribe could and did, without Joseph's consent, effectively cede Wallowa to the defendant by the treaty of 1863, in which event plaintiff claims that it is entitled to receive its pro rata share in the consideration paid to the Nez Perces and

to receive compensation for the allotments in the Nez Perce Reservation which it should have been given and never obtained. Plaintiff encounters at the outset the difficulty of establishing title to the Wallows area in Joseph's hand, as dis-

tinguished from the tribe as a whole, a difficulty which its

evidence does not overcome. Claim of title is based on its alleged immemorial possession of Wallowa. But it does not appear from the evidence that Joseph and his band ever had exclusive possession of the Wallowa area. What does appear is that Joseph and his band made their peculiar home at different periods in the region around the mouth of the Salmon, on the Snake River, on the Impaha River, and on the Grande Ronde River near its mouth. The latter two locations are within the Wallowa area. In the summer Joseph's band went to the interior of the Wallowa area for the purpose of hunting, fishing, and grazing, but other hands of Nez Perce Indians regularly resorted there for the same

purpose. There was nothing in the treaty of 1855 which either recognized any title to the Wallowa area in Joseph's band or gave to that band or any other band title to specific parts of the lands reserved to the Nez Perce Tribe by that treaty. Indeed the elder Joseph's conduct in participating in the negotiation of and signing the treaty of 1855 shows that there must have been power in the tribe to set as a whole with reference to all lands of the tribe or any of its bands. If not Joseph in that treaty would have been relinquishing lands which he and his band did not own, since none of the land now claimed to have been immemorially occupied by Joseph's band was relinquished in that treaty.

We conclude that the Nez Perce Tribe, as an entity, had the power to make the treaty of 1863 and that the dissenting minority, including the members of plaintiff band and the

other nontreaty Nez Perces, was bound by that treaty. Plaintiff does not, and could not, found its claim on the executive order of 1873. That order is offered only as a recognition of a title then existing in plaintiff. It was not such a recognition. It was for all the nontreaty or "roam-

ing" Nez Perces, and not for Joseph's band alone. Plaintiff's alternative claim for relief, viz, the right to a pro rata share of the Nez Perce tribal income and property under the treaties and agreements of the tribe with the United States, is not set forth in its petition, and is not properly before the court. Further, it is not proved that Opinion of the Court
such benefits were denied to any member of plaintiff's band,
because he was such a member, if he was willing to accept
them.

In our consideration and decision of this case we have not been unaware of the fact that to assimilate the political organization of a tribe of Indians such as the Nez Perces of the control of the cont

by no means voluntary agreements between equals. Perhaps treatise seldom are, or were, even as between white men, and even before the current plague of "treaties." But the negotiations for the treaty of 1865, with the giving of Government's unselfish motives, the cajoling and threatening of the dissident chiefs, and the complete insistence that the treaty be made as the Government desired it, and with the compromise, does not make pleasant reading. In these among the numerous councils at which treaties with Indians were made.

This method, such as it was, was the Government's then method of dealing with the Indians, and hence these treaties define the legal rights of the Indians and the Government. It follows that, though the discontent of Joseph and his brethren was natural and understandable, the present remnant of his band has no basis for suit.

The petition will be dismissed. It is so ordered.

Jones, Judge; Whitaker, Judge; Lattleton, Judge; and Whalet, Chief Justice, concur.

# Reporter's Statement of the Case

## THE WARM SPRINGS TRIBE OF INDIANS OF OREGON v. THE UNITED STATES

[No. M-112. Decided November 3, 1941. Plaintiff's motion for new trial overruled and findings amended February 2, 1942]

## On the Proofs

Indian claims; boundaries of reservation set aside for plaintiff tribe under the treaty of IRSS--Under the jurisdictional act of December 23, 1980 (46 Stat, 1033), authorizing the Court of Claims to hear, determine, adjudicate and render judgment on all legal and equitable claims of whatsoever nature of the Warm Springs Tribe of Indians or of any band thereof against the United States, arising under or growing out of or incident to the treaties of June 25, 1855 (12 Stat. 963), and of November 15, 1865 (14 Stat. 751), or either of them, notwithstanding the large of time and notwithstanding the provisions of the

Act of June 6, 1894 (28 Stat. 88), it is held: 1. That the porthern boundary of the reservation set aside for the Warm Springs Tribe of Indians by the said treaty of 1855 runs from McQuinn's 30-mile post at Little Dark Butte southeastwardly along the line established by McQuinn to McOminn's 714-mile nost and thence in a straight line to the starting point on the De Chutes River established by Handley: 2. That the western boundary of said reservation is the

western boundary established by McOuinn: 3. That the plaintiff is entitled to recover the value of the lands between these boundaries and the northern and western

boundaries established by Handley and Campbell; 4. That the plaintiff is not entitled to recover on its claims involving amounts agreed to be spent by defendant for the benefit of the Indians and for the erection of certain buildings and for other purposes, where it is shown by the proofs that

far more money had been spent than was called for by the 5. That there is no proof that the bands named in the proviso to the treaty of 1865 met in council and expressed a desire that some other reservation should be selected for them, as

### required by said proviso. The Reporter's statement of the case:

Mr. R. M. Goodsoin for the plaintiff. Mesers Laurence Cake, Francis B., Galloway, William S., Lewis, A. R., Serven, and John G. Carter were on the briefs.

Mr. Charles H. Small, with whom was Mr. Assistant Attorney General Norman M. Littell, for the defendant, Mr. Raymond T. Nagle was on the brief.

The decision in this case was filed November 3, 1941. A notion for new trial was filed by the plaintiff on the ground that the court in its opinion fixed incorrectly the southern boundary of the reservation in question. On February 2,

1942, said motion was in all respects overruled. However, the findings of fact filed on November 3, 1941, were on the court's own motion amended by adding a finding (18-a), as indicated.

The court made special findings of fact as follows:

1. This case is before the Court under the jurisdictional act of December 29, 1909 (40 Stat. 1003), which authorizes the Court to hear, determine, adjudicate and render judgement on all legal and equitable claims of whatsoever nature of the Warm Springs Tribe of Indians or of any band thereof against the United Estates, arising under or growing out of or incident to the treaties of June 25, 1855 (19 Stat. 980.) and of November 51, 1895 (14 Stat. 751), or either of them, notwithstanding the lapse of time and notwithstanding the provisions of the act of June 6, 1984 (28 Stat. 89).

2. The Warm Springs Tribe of Indians occupied a large area of land in Oregon south of the Columbia River and east of the Cascade Mountains, chiefly along the De Chutse River and its tributaries. They are described in governmental Riverstand as the Tuh or Upper De Chutse Band of Walla Wallas, the Yenirus Band, the Dock Chutse Band of Walla Wallas, the Tenirus Band, the Dock Chutse Band of Walla Wallas, the Tenirus Band, the Dock care all bands of Waccose or Dalles Indians, all of whom were confederated together by the United States and described as the Warm Springs Tribe of Indians.

the Warm Springs Tribe of Indians.

3. The treaty of June 25, 1885 (12 Stat. 983), was negotiated by Joel Palmer, acting for and on behalf of the United States, and by the chiefs and beadmen of the bands of Indians known as the Warm Springs Tribe of Indians of Indians known as the Warm Springs Tribe of Indians converse as the Control of Indians States and the Indian Indians, at a place removed some fifty miles from the near-boundary of the Indian reservation described in the treaty as set spart for the plaintiff.

Reporter's Statement of the Case

Palmer had but slight knowledge of the country and its topography, having passed through it but once. The plaintiff was familiar with it to a somewhat greater extent, having roamed over it to hunt, fish, and gather roots and berries.

At the time it was negotiated Palmer exhibited to the Council a sketch of the territory, filed in this case as enclosure No. 47 to the report of the Secretary of the Interior, dated November 2, 1933, which is reproduced herein and attached as appendix No. 1 to this opinion.

4. The Mutton Mountains run from southwest to north-

east. The northeast terminus of these mountains is on the De Chutes River between the mouth of Antoken and Eagle Creeks. There is a range of high lands running from the Cascade Mountains on the west, southeastwardly toward the De Chutes River in a fairly uniform course, which forms a well defined drivide between the White River system on the north and the Warm Springs system on the south. The existence of this divide and its general course was known to

the parties at the time the treaty was signed.

About 8 or 9 miles west of the De Chutes River this di-

vide breaks up into spurs, one running northeasterarily, from the point to the De Chutes River there is no continuous east and west divide, although from the point where the east and west divide breaks up into spurs more than one divide can be followed to the De Chutes River. This region is traversed by the Antoken, Eagle, Nena and Wapinitia Creeks, which empty into neither he warm Springs River nor the While River.

but into the De Chutes River.

5. About two years after the treaty was negotiated and signed Indian Agent R. R. Thompson, together with the principal chiefs and headmen of the bands, made an exploration of the reservation. At this time Thompson pointed out to the Indians his idea of the general course of the northern boundary.

No reservation was ever selected by the Indians other than the reservation described in the treaty. Reporter's Statement of the Case

Before 1859 practically all of the Indians who were parties
to the above-mentioned treaty had been settled upon the reservation described in the treaty.

wation described in the reasty.

6. In 1871 a survey of a portion of the northern boundary
was made by T. B. Handley, United States Surveyor, who
an the line from a certain point on the De Chutes River to
his thirty-one mile post. Later, the remainder of the norther ren boundary was run by R. T. Campbell from Handley's
twenty-six mile post, due west to the Cascade Mountains, to
the Handley-Campbell 36-mile post; thence Campbell ran

the western boundary in a direct line to Mt. Jefferson.

7. In 1878 nother survey of the northern boundary was run by John A. McQuinn. McQuinn originally established his starting point on the De Chuste River 20 chains south of the starting point established by Handley. But, on account of the opposition of the Indians, be later determined upon another point between the mouths of Nena and Eagle Creeks. From this point he ran acoultiveswerdly in a straight line to has 175 mile post, which was located at a tree allegad to have northern boundary of the resurration pointed out by him to the Indians. From this point McQuinn's survey ran in the straight line northwartern depression of the straight of the resurration pointed out by this of the Hadians. From this point McQuinn's survey and a straight line northwarternally to his 30-mile post at Little and the straight the northwarternally to his 30-mile post at Little and the straight line northwarternally to his 30-mile post at Little and the straight line northwarternally to his 30-mile post at Little and the straight line northwarternally to his 30-mile post at Little and the straight line northwarternally to his 30-mile post at Little and the straight line northwarternally to his 30-mile post at Little and the straight line northwarternally to his 30-mile post at Little and the straight line northwarternally to his 30-mile post at Little and the straight line northwarternally to his 30-mile post at Little and the straight line northwarternally to his 30-mile post at Little and the straight line of the straight lin

Dark Butte on the Cascade Mountains.
There is reproduced herein and attached as appendix No. 2
to this opinion a diagram showing the Handley-Campbell
survey and the McQuinn survey, and also the topography of
the country on the northern and western boundaries (filled
in this case as enclosure No. 49 to the report of the Secretary
of the Interior dated November 2, 1933).

8. In 1883 a representative of the General Land Office and a representative Office Indian Office, H. Martin and George W. Gerofon, appointed to investigate the two surveys and represent on which one name nearly confinemed to the treaty, reported (S. Er. Does. Vol. 7, No. 70, 50th Cong., 1st see, 1897–1898) that the Handley line more nearly conformed thereto, but that it materially varied from the boundary as described in the treaty. Attacked to their report was a disgram giving their idea of the true course of the northern boundary, which coincided in some respects with Handley's

## Reporter's Statement of the Case

line, and in other respects with McQuinn's line, but varied materially from both.

9. In 1889 the line surveyed by McQuinn was adopted by

the Department of the Interior as the true northern bound-

ary of the reservation.

10. In 1890 a Commission was appointed under authority of an act of Congress (26 Stat. 393, 353) to investigate the various claims as to the true northern boundary. This commission reported that the Handley-Campbell line was the true northern boundary, and Congress on June 6, 1894, passed an act (28 Stat. 86) establishing this boundary in the control of the con

the true northern boundary of the reservation.

11. In 1917 (39 Stat. 989) Congress appropriated the sum of \$5,000 for a further investigation into the question of the true northern boundary. Pursuant thereto Fred Mensch, United States Surveyor, investigated the question and reported that the McQuinn survey was the correct northern boundary of the reservation.

12. In 1919 the Commissioner of the General Land Office reviewed the Mensch report and concluded that the Hand-

ley-Campbell line was the true northern boundary.

13. The true northern boundary of the reservation runs

from the 7½-mile post of the McQuinn survey in a direct line to his 30-mile post at Little Dark Butte in the Cascade Mountains. From McQuinn's 7½-mile post it runs in a direct line to the point in the middle of the channel of the De Chutes River established by Handley as his initial point. The western boundary of the reservation runs from

McQuinn's northwest corner in a direct line to the summit

of ML Jefferson.

(Ma. The southern boundary of the reservation runs from URs. The southern boundary of the reservation runs from the property of the property

termination of a range Mutton Mountains."]

Opinion of the Court

 Pursuant to the provisions of articles 2, 3, and 4 of the treaty of June 25, 1855 (12 Stat. 985), the United States has disbursed for the benefit of plaintiff Indian tribe the sum of \$313.682.72.

15. Pursuant to the provisions of the treaty of Novemember 15, 1865 (14 Stat. 751), the United States has disbursed for the benefit of plaintiff Indian tribe the sum of \$3,500.00.

The court decided (1) that the northern boundary runs from ACquinn's  $38^{-1}$ mle post at Little Day. Blute southeastwardly along the line established by him to his  $77_{\rm cm}^{-1}$ mle post, and theseo in a straight line to the starting point on the De Chutes River established by Handley; (2) that the western boundary is the western boundary established by ACquinn; (3) that the plaintiff was entitled to recover the value of the lands between these boundaries and the northern and western boundaries established by Handley and Campbell; and (the the plaintiff was not entitled for evere on its other claims, the plaintiff was not entitled for evere on its other claims.

WHITAKER, Judge, delivered the opinion of the court: By the treaty of June 25, 1855 (12 Stat. 983), the plaintiff Indians coded to the United States all the lands to which they laid claim, except a certain tract which was set apart for their exclusive use. This tract is described as follows:

Commercing in the middle of the channel of the De Chutter River opposite the eastern termination of a range of high lands usually known as the Mutton trange, along the divide to its connection with the Cascade Mountains; there to the numeric of and mounter the contract of the contract of the contensive the contract of the Chutter River; and there is also the contract of the Chutter River; and there peak, to its junction with De Chutter River; and there peak to the junction with De Chutter River; and there place of the principle of the channel of said river to the place of the principle.

The setting spart of the above-described lands as a reservation for them was, however, subject to the following proviso:

Provided, however, That prior to the removal of said Indians to said reservation, and before any improvements contemplated by this treaty shall have been comcontrol that Capanina in Capan

The plaintiff alleges that in pursuance of the agreement contained in this proviso another tract was selected. This tract embraces the reservation which the defendant claims is the one described above and, in addition, a very large territory, some three or four times larger.

 The first question presented is whether or not the tribe did in fact select a reservation other than the one above described.

There is no proof whatever in the record that the bands named in the proviso met in council and expressed a desire that some other reservation should be selected for them, as the treaty required. The extent of plaintiff's proof is that Indian Agent R. R. Thompson, together with the chiefs and a number of the principal men of the bands included in the treaty, went upon the reservation and that there Thompson pointed out to them its boundaries. Plaintiff's proof, therefore, is not that another reservation was selected, but only that the boundaries of the reservation described in the treaty. as pointed out to them by the Indian Agent, were not the boundaries contended for by the defendant. There is no proof that the Indians selected any reservation other than that described in the treaty. Since no other reservation was selected, the plaintiff is bound by the description of the reservation as contained in the treaty.

The trip of the Indian Agent and the chiefs and principal men of the tribes to the reservation was made some two years after the treaty was signed. Even if it be true that on this trip the Indian Agent pointed out to them boundaries other

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than those described in the treaty, this cannot vary the terms
of that written instrument accepted by them two years before. There is no proof nor allegation that these boundaries
were pointed out to them before the treaty was signed.

were pointed out to them before the treaty was signed. Moreover, plaintiff's evidence of what happened on this trip is unsatisfactory. At the time testimony in this case was taken there was but one person living who had accompanied the Indian Agent on this trip, one Albert Kuckup, 100 years old. He testified that the Indian Agent pointed out to them as their reservation the lands marked in green on the map filed as exhibit "B" to plaintiff's petition, beginning at Little Dark Butte on the summit of the Cascade Range; running thence southwardly through Olallie Butte, Mt. Jefferson, Three Fingered Jack, The Three Sisters, to Koo-See Wah Tum or Horse Lake; and thence south and east to the Paulina Mountains; thence northwardly through Powell Butte, Grizzly Butte, How-Sash, and Shnip-Shee or Bake Oven; thence westwardly to the point of beginning. Even though this would be material, if true, it is evident from his testimony and from the testimony of other witnesses for the plaintiff that this trip was not for the nurpose of selecting some other reservation, but for the purpose of exploring the reservation described in the treaty.

This is also evident from Thompson's report on the trip to Joel Palmer, Superintendent of Indian Affairs for the Oregon territory. In the beginning of his letter he stated that he had just returned from "an exploration of the Wasco or Warm Springs reservation." Thompson says nothing in his report about exploring any part of the country other than the reservation which the defendant insists was set apart for them. From his letter it would appear that the purpose of the trip was primarily to select grounds for the Indian settlement. He says that for this purpose they selected two places south of Warm Springs, one on the She-tike Creek, and another in a valley about two miles west, where the She-tike empties into the De Chutes River. Both of these settlements are within the reservation which the defendant contends was set apart for them. (See exhibit "B" to plaintiff's petition.) The treaty of 1855 contained a proviso that the Indians Opinion of the Court

should have the exclusive right to fish in the streams running through or bordering the reservation; and also, "at all other usual and accustomed stations, in common with citizens of the United States," they were to have "the privilege of hunting, gathering roots and berries, and pasturing their stock on unclaimed lands, in common with citizens." It is not at all clear from Kuckup's testimony whether the land pointed out to the exploring party was the land set apart to them as a reservation, as they claim, or were the lands in which they had a right to hunt and fish and gather roots and berries. According to the testimony, the Indians did hunt and fish and gather berries within the territory described by Kuckup during the summer, but in the winter they returned to the settlements selected for them within the boundaries of the reservation as claimed by the defendant. Plaintiff introduced other witnesses who testified to the

boundaries of the reservation as reported to them by this delegation, or to boundary marks which they had seen on the ground; but their testimony adds nothing to the testimony of Kuckup.

The plaintiff's proof completely fails to establish the selection of any reservation other than that described in the treaty.

2. The next question presented is the boundaries of the reservation described in the treaty. The question of the southern and eastern boundaries is comparatively easy of determination. The defendant contends that the southern boundary begins at the headwaters of defference Orcek in Mk. Jefference, and runs thence along this creek to the Mothies River, and thence along this river to its junction with the River and thence along this river to its junction with the the headwaters of a stream rising in The Three Sitesters, and running thence with that stream to its junction with the De Cluttes River. We think defendant's contention is correct. The boundaries as described in the treaty read in part as follows:

\* \* \* thence southerly to Mount Jefferson; thence down the main branch of De Chutes River; [,] heading in this peak, to its junction with De Chutes River, \* \* \* The plaintiff says that the main branch of the De Chutes River does not rise in Mt. Jufferson, but rises in The Three Sisters and, therefore, that we should disregard Mt. Jefferson as the southern terminus of the western boundary, and continue that boundary to The Three Sisters.

It is true the stream rising in Mt. Jefferson is not designated on the map field as exhibit <sup>197</sup> to plaintiff spetition as a branch of the De Chutes River, but, nevertheless, the stream there rising empties into the De Chutes River, and well might have been thought of as a branch thereof. This must have been the sterm in the minds of the parties when the treaty was drawn because it is perfectly clear that values of the contract of the properties of the contract of the contract of the properties of the contract of the co

If it be correct to say that Mt. Jefferson is the southern terminus of the western boundary, then it follows necessarily that the southern boundary of the reservation runs from Mt. Jefferson along the Jefferson Creek until it empties into the Metolius River, thence along this river to its junctions with the Dc Cluttes River, and that the eastern boundary runs northwardly up the Dc Cluttes River to the terminus of the sestern boundary.

The proper location of the northern boundary is much more difficult to determine.

It was originally surveyed to within several miles of the western boundary by T. B. Handley in 1871. Later his survey was extended by Campbell from Handley's 28-mile post in a daw set course to the summit of the Cassels Mountains. The Indians were much dissatisfied with these survey and, accordingly, on December 17, 1898, a new survey was provided to the contract of the contract of the contract lowing year. His survey included a substantial amount of land in addition to that included by Handley.

The white settlers were disastisfied with this survey and, to settle the dispute, the General Land Office and the Indian Office ordered representatives of their two offices, H. B. Marin and George W. Gordon, to determine which line "would

### Opinion of the Court

nearest conform to the treaty." They reported that the Handley line "more nearly conforms to the requirements and conditions of the treaty, but that at certain places he is materially at variance with its terms and intentions." They recommended a line which conformed in part with the Handlev line and in part with the McQuinn line, but which was at variance with both in material respects. The McQuinn line was substantially in accord with the claims of the Indians and, to satisfy them, the Department of the Interior on July

19, 1889 approved the line as established by him. Following this, in 1890 (26 Stat. 336, 355) Congress authorized the appointment of a commission-

> . whose duty it shall be to visit and thoroughly investigate and determine as to the correct location of the northern line of the Warm Springs Indian Reservation, in the State of Oregon, the same to be located according to the terms of the treaty of June twenty-fifth. eighteen hundred and fifty-five.

The Commission appointed pursuant thereto filed a detailed report on June 8, 1891, in which they said:

That the line known as the McQuinn line, as surveyed and run, in no respect conforms to the said treaty of 1855, and is not the line of the northern boundary of the Warm Springs Reservation or of any part thereof. That the line known as the Handlev line, as surveved and run, substantially and practically conforms to the calls of the said treaty of 1855 from the initial point of said line up to and including the twenty-sixth mile thereof.

It is therefore considered and declared by the Commission that the northern boundary of the Warm Springs Indian Reservation, in the State of Oregon,

is that part of the line run and surveyed by T. B. Handley in the year 1871, from the initial point up to and including the twenty-sixth mile thereof, thence in a due west course to the summit of the Cascade Mountains.

On the incoming of this report, Congress on June 6, 1894 passed an act (28 Stat. 86) which provided:

\* \* That the true north boundary line of the Warm Springs Indian Reservation \* \* \* is hereby declared

Opinise of the Case?

to be that part of the line run and surveyed by T. B. Handley, in the year eighteen hundred and seventy-one, from the initial point up to and including the twenty-sixth mile thereof; thence in a due west course to the summit of the Caseadé Mountains, as found by the commissioners, Mark A. Fullerton, William H. H. Dufur, and James F. Payne.

Notwithstanding such congressional adoption of this line, the appropriation act of March 2, 1917 (39 Stat. 969) appropriated \$5,000—

\* \* for an investigation and report on the merits of the claim of the Indians of the Warm Springs Reservation in Oregon to additional land arising from alleged erroneous surveys of the north and west boundaries of their reservation \* \* and the Secretary of the Interior is hereby authorized to make such sur-

the Interior is hereby authorized to make such surveys or resurveys us may be necessary to complete said investigation and report.

Pursant thereto United States Surveyor Fred Mensch was appointed to make this investigation. He reported on January 16, 1919, going into the controversy in detail. He criticized the Handley survey in a number of respects, and concluded that the McQuinn line was the proper northern boundary.

Following this the Commissioner of the General Land

Office filed a detailed report criticizing the Mensch report, and concluded that the plaintiff was not "entitled to any land or to any indemnity under the terms of the treaty of June 5, 1855, as construed by Congress in the act of June 6, 34, outside of the present Handley-Campbell north and west boundaries of said reservation."

Lastly, Congress on December 23, 1930, passed an act (46 Stat. 1938) conferring jurisdiction on this court to adjudicate the claims of the Indians—

\* \* notwithstanding the provisions of the Act of June 6, 1894 (Twenty-eighth Statutes, page 86) \* \* \*,

under which the Handley-Warm Springs Commission line was adopted.

It will thus be seen that we are confronted with a problem quite difficult of solution.

## Opinion of the Court

The treaty defines the northern boundary as follows:

Commencing in the middle of the channel of the De Chutes River opposite the eastern termination of a range of high lands usually known as the Mutton Mountains: thence westerly to the summit of said range, along the divide to its connection with the Cascade Mountains: thence to the summit of said mountains.

In establishing this line two difficulties are met with: (1) the determination of the point in the De Chutes River "opposite the eastern termination of a range of high lands usually known as the Mutton Mountains": and (2) what was meant by the phrase "along the divide to its connection

with the Cascade Mountains." In the region there is one main divide, that between the White River and its tributaries on the north, and the Warm Springs River and its tributaries on the south. It seems evident that the northern boundary was intended to run along this divide, and it would seem that, having established the starting point, it would be fairly simple to run the line to its western terminus. Difficulty, however, is encountered due to the fact that at a point about 18 miles from the Cascade Mountains on the west the main divide between the Warm Springs and White River systems divides into spurs. some running northwardly and others southwardly to, or approximately to, the De Chutes River. In this territory there are a number of creeks which flow into neither the White River nor the Warm Springs River, but into the De Chutes River on the east, so that there is no continuous east and west divide running the entire distance from the De Chutes River to the Cascade Mountains (See particularly the map filed as exhibit "B" to plaintiff's petition, the topographical map filed as plaintiff's exhibit "A", and the diagram accompanying Fred A. Mensch's report, enclosure No. 49 to the report of the Secretary of the Interior dated November 2, 1933, which diagram is reproduced and filed as an appendix to this opinion,)

Beginning on the north, these creeks are Wapinitia Creek, Nena Creek, an unnamed creek, Eagle Creek, and the Antoken Creek on the south. The headwaters of both Ragle Creek and Nena Creek are considerably south of any posible starting point, so that if the divide between any two of the creek is starting point, so that if the divide between any two of the creek is starting point, and the contract of the creek Warm Springe River system, the northern boundary would dip far to the south on in westward course. On the other hand, if the spur to the porth is followed, the line would shoot far to the north of an east vester course. The their difficulty lies in running the line from the point where the difficulty lies in running the line from the point where the one the Po Churck River.

But, before settling this question, let us determine the starting point on the De Chutes River. This is described as a point in the De Chutes River opposite the eastern termination of the Mutton Mountains. Handley fixed this as a point on the river between the mouths of Antoken Creek and Eagle Creek; McQuinn fixed it several miles north, at a point on the De Chutes River between the mouths of Wapinitia and Nena Creeks. We are of opinion that the point fixed by Handley is substantially correct. McQuinn in fact originally fixed his starting point twenty chains south of Handley's point, instead of six miles north thereof. He changed it only because the Indians were greatly dissatisfied with it and threatened to destroy all corners that he might establish, if it were adhered to. To meet this situation the Indian Agent was instructed by the Indian Office to undertake to arrive at an understanding with the Indians. They insisted that the beginning point was farther north between the mouths of Wapinitia and Nena Creeks, and this was agreed to and adopted by McQuinn, but only in order to satisfy them, and not because he thought it was where the treaty designated the beginning point to be.

The report of the Warm Springs Commission states:

The initial point of the McQuinu line is located in the Dc Chutes River coposite a range of low lands or hills called "Neena Hills," some 10 or 12 miles north of and down the Dc Chutes River from the eastern termination of Muton Mountains. This line does not touch the range of highlands known as Muton Mountains at any range of highlands known as Muton Mountains at any sometimes along and sometimes across a range of low-lands or hills.

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Since his starting point was not opposite "the eastern termination" of the Britain Mountains, it must be rejected, the starting point was not opposite "the eastern termination" of the Britain Mountains, it must be rejected, and the starting termination of the starting termination of the range of mountains, according to the topographical map filled as plaintiff exhibit "A", is in the neighborhood of the point established who (Moglime Inforte he encountered the ceptodition of the Indians. These mountains do not extend to the point finally adopted by McGuinn Inforte was captainly point in the properties of the Indians. These mountains do not extend to the distribution of the Indians. These mountains do not extend to the distribution of the Indians. These mountains do not extend to the distribution of the Indians. These mountains do not extend to the Indians. The Indians is the Indians of Indians

Everyone who has surveyed this northern boundary or investigated the surveys thereof agrees that this is approximately the proper beginning point according to the terms of the treaty, with the sole exception of Mensch. He thinks McQuinn's starting point, as finally adopted, is correct, but, as we have stated. McQuinn adopted this point not because he thought it was the beginning point as defined by the treaty, but only to satisfy the Indians. The Indians claimed that this was the proper beginning point because it was the point pointed out to them by Indian Agent Thompson, but we do not regard this as material, since this was done two years after the treaty was signed. Mensch undertakes to justify it by showing that from this point a divide can be followed to the Cascade Mountains; but this is not conclusive because a divide can be followed to these mountains from other places opposite the Mutton Mountains on the De Chutes River. The fact that a divide can be followed from McQuinn's starting point to the Cascade Mountains is nullified by the fact that it is not opposite "the eastern termination" of the Mutton Mountains. Nor do the hills opposite this point extend to the De Chutes River. The Mutton Mountains to the south extend considerably to the east of the eastern termination of these hills.

After careful consideration of all the testimony we are of opinion that the starting point fixed by Handley is substantially correct.

From this point the treaty provides that the line runs to the summit of the Mutton Mountains; and thence "along the divide to its connection with the Cascade Mountains." As heretofore stated, if the divide or watershed is strictly followed, the northern boundary twice would dip far to the south, since the headwaters of Eagle Creek and Nena Creek are far to the south of the starting point. We are convinced that this was not intended by the parties. We are of opinion that the parties intended that the northern boundary should run in a fairly straight line in a general east and west direction. There is attached to the report of the Secretary of the Interior in this case, dated November 9, 1933, enclosure No. 49, a sketch of the Warm Springs Reservation used by General Palmer when he negotiated the treaty with the Indians, which sketch is filed herein as appendix No. 1 to this opinion, This sketch shows a range of mountains on the north of the reservation, which runs in an almost due east and west direction from the De Chutes River to the Cascade Mountains. We think the parties relied upon this sketch as showing the approximate course of the northern boundary. Palmer himself was but slightly familiar with the country. The Indians were somewhat more familiar with it. They no doubt were familiar with the general course of the divide between the Warm Springs River system and the White River system, because this divide is fairly well defined but it is extremely doubtful that any of them knew that the east-west divide discontinued on the eastern part of the reservation In the west it runs from the Cascade Mountains in a direction slightly south of east, in a fairly straight line. We feel sure the parties contemplated that the northern

boundary would run in a fairly straight line in noturnal east and west direction. It is not reasonable to suppose that any of them thought that it would dip far to the contra set is approached the eastern boundary. Their idea of its course must have been substantially that shown on Ghannel Palmer's sketch. The divide from the Cascale Montains on the west to the point where it discontinues its easterly course and breaks up into purps, being known and being substantially in accord with General Palmer's sketch, we think was in the minds of the parties when the treaty was sigmed.

#### .

But we have no reason to think that any of the parties knew that this divide broke off into widely divergent spurs as it approached the eastern boundary. They believed, we think, that it continued on in its general easterly course to the De Chutes River, as was indicated on General Palmer's sketch.

We are of the opinion, therefore, that when the point is reached where the divide cases it seat and west course and breaks up into apure, the divide should be abandoned and a straight line run from this point to the initial point on the Dc Chete River. This is the course the White River-Warn Springs River divide would have taken had it continued its course to the Dc Chete by Wapinita Creak on the south, and the course to the Dc Chete by Wapinita Creak on the south, which was not the above the south of the Antoken Creek on the south, with their corresponding ridges. It is substantially, we think, what was in the minds of the parties when the treaty was signed.

No survey has exactly followed the divide between the White River and Warm Springs River systems from the Cascade Mountains to the end of its east-west course, but McQuinn's survey substantially does so. From his 71/6-mile corner, where the blazed tree pointed out by Indian Agent Thompson is supposed to have stood, his line runs in a straight line to his 30-mile post, which is on the summit of the Cascade Mountains at Little Dark Butte. By reference to Mensch's "Diagram accompanying the Investigation Report of the north and west boundaries of the Warm Springs Indian Reservation, Oregon," filed as an appendix hereto, it will be observed that McQuinn's line runs slightly north of the divide from his ten-mile post to his twentymile post, and from this point to between his 28rd and 24th mile post it runs to the south, and from this point on, to the north of the divide. He has erred both on the one side and the other. It, however, substantially conforms to the terms of the treaty, and we are of opinion that considerations of justice and equity, as well as of putting an end to uncertainity and further litigation, dictate that we adopt his line as the true northern boundary from his thirty-mile post at Little Dark Butte to his 71/6-mile post. From this point to the initial point as established by Handley we think the northern boundary should run in a straight line.

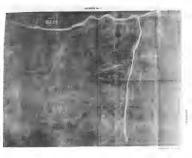
4. There remains the question of the western boundary. The western boundary is described in the treaty as running from the northwestern corner of the reservation "south-or not the treaty intended that it should run in a direct line from the northwestern corner to Mr. Jefferson, or should run in a southerly direction to Mt. Jefferson along the summit of the Cascade Mountains is not mentioned, there is some warrant for saying the line should run hong it, some warrant for easily and the summit of the Cascade Mountains is not mentioned, there is some warrant for easily at the line should run along it, as the sum of the summit of the cascade Mountains is not mentioned, there is some warrant for easily at the line should run along it, and the summit of t

Commencing in the middle of the Columbia River, at the Cascade Falls, and running these southerly to the summit of the Cascade Mountains; these along said summit to the forty-fourth parallel of north attitude. From this tract there was reserved the reservation the

boundaries of which are in dispute. Since the western boundary of the land ceded the United States was the summit of the Cascade Mountains, it would appear resonable to suppose that the parties understood the western boundary of the Indian reservation to be the summit of the Cascade Mountains.

However, both Campbell and McQuinn have run the westren boundary on a straight line from their respective northwest corners to Mt. Jefferson. Campbell's line runs most of the way to the east of the summit of the Cascade Mountains. McQuinn's vestern boundary would include within the reservation considerable territory to the west of the restrains, and immediately to the south would exclude apvalue, and immediately the south would exclude apvalue of the summit of the reservation. And immediately the south would exclude a seminimal control of the summit of the respective of the seminimal control of the summit of the summit of the summit of these mountains. (See diagram atimes slightly to one side and sometimes alightly to design and summit of these mountains. (See diagram acompanying Mench's report hersofter referred to.)

Although there is doubt that McQuinn's western boundary is in exact accord with the intention of the parties when the treaty was signed, we think it does substantial





Opinion of the Court
justice, and for this reason and to avoid another survey of
these boundaries we adopt McQuinn's western boundary
line as the true western boundary of the reservation.

We therefore conclude that the defendant has appropriated to its own use all of the lands to the north of the Handley-Campbell line, and south of the true north bound ary as herein defined, and the plaintiffs are entitled to recover the value thereof. The defendant has also appropriated to its own use all of the lambs between the Campbell defined, and the plaintiff is entitled to recover the reasonable values thereof.

The plaintiffs are not entitled to recover for any rights secured to them in the territory outside of the reservation as herein defined.

5. Under the treaty of 1855 the defendant agreed to expend for the beniefs to the Indians be sum of \$18,000 and to exect certain buildings and to furnish certain equipment, and to furnish and pay certain employees. The plaining that the properties of the plaining that properties the open of the support of the General Accounting Office shows that far move has been spent than is called for by the treaty. Even though the defendant may not have exceed the precise buildings called for, the offiets to which the defendant The called the contract of the con

We conclude as a matter of law: (1) that the northern boundary runs from McQuinn's Somile post at Little Dark Butte along the line established by him to his 7½-grain post, and thence in a straight line to the starting post on the De Coutes River established by Handley; (2) that the western boundary is the western boundary is the described by McQuinn; (4) that the plaintiff is entitled to recover morthern and western boundaries established by Handley and Campbell; and (4) the plaintiff is not entitled to recover on its other claims. It is so ordered.

Madden, Judge; Jones, Judge; Lattleton, Judge; and Whaley, Chief Justice, concur.

#### Syllahus

#### ENGINEERS' CLUB OF PHILADELPHIA v. THE UNITED STATES

[No. 44568. Decided February 2, 1942]

#### On the Proofs

Socies tag: daes and institution loss of members of secular cital; respectively.

\*\*pulsions\*\*—where under a dictionis or a District Court of the United States it was held that the plaintiff cits was not a notial cital and linearc that the does and initialization feet of its members were not taxable under Section 201, Revenue Act of 1900, as amonded; it is aboth that the question whether or not the plaintiff was a social cital, during the period in question to the plaintiff was a social cital, during the period in question to the plaintiff was a social cital, during the period in question to the plaintiff was a food of the plaintiff was a

Same; lack of identity of parties — A judgment in a suit against a collector of internal revenue for relund of taxes poid list not res fudicata in a later auth against the Commissioner of Laternal Revenue or the United States, because of a lact of identity of parties. Bankers Pecohantsa Cost Co. v. Burnet, Commissioner, 237 U. S. 308, Citch.

Some; sifterent set of foots—Where the parties to a suit in a District Court of the United States and the parties in the instant are identical but where the facts are not identical, involving different though similar nests of events; it is Add that the judgment of the said District Court is not res judicats. Tail V. Western Marquad Ru. Oc. 250 U. S. 600. distinguished.

v. Western Marpinsa Rp. Co., 289 U. S. 620, distinguished.
Some.—Where plaintiffs activities in the perfoil of question in the interpretation of the perfoil of perfoising the inatant case were not those of an earlier period, perefosally illigated, hough comparable and similar, the court may not close its eyes not minds to the facts actually before the court could not give to any other plaintiff a polement which the court would not give to any other plaintiff a polement which the court would not met.

Same.—The doctrine of res judicata should not be so extended.

Same.—Where it is found, upon the cyldence, that plaintiff's operations

—water it is found, upon the evinence, unar parameter soperations for the period in question in the inisiant suit, July 1895 to January 1388, were for tax purposes those of a social club, it is keld that the excise taxes on the dues and initiation fees of plaintiff's members were properly collected, under Section 501 of the Revenue Act of 1805 as amended (U. S. Oode, Title 26, Sections 805, 051, 902), and plaintiff is not entitled to recover.

# 42 Reporter's Statement of the Case

The Reporter's statement of the case:

Mr. John E. Hughes for the plaintiff. Mr. William Cogger was on the briefs. Mr. Fred K. Dyar, with whom was Mr. Assistant Attor-

ney General Samuel O. Clark, Jr., for defendant. Mr. Robert N. Anderson was on the brief.

The decision in this case was filed on November 3, 1941, with special findings of fact and opinion by Judge Madden and concurring opinion by Judge Whitaker; the petition being dismissed.

On the plaintiff's motion for new trial the court, on February 2, 1922, entered an order allowing said motion; the findings of fact filed on November 3, 1941, were vacated and withdrawn, and amended findings were filed in lieu thereof; the former indigment and opinions to stand

On February 2, 1942, the court made amended special findings of fact as follows:

1. Plaintiff, a corporation organized under the laws of Pennsylvania and located at 1317 Spruce Street, Philadelphia, Pennsylvania, was incorporated in 1892 for the

following purposes:

\* \* to promote the Arts and Sciences connected
with Engineering, by means of periodical meetings for
the reading and discussion of professional papers, and
the circulation by publication among its members and
others of the information thus obtained, and for social
intercurse.

2. Article I of its bylaws relating to membership pro-

vides:

Section 1. Professional engineers, or persons who, by scientific, technical, or practical experience are qualified

scientific, technical, or practical experience are qualified to cooperate in the advancement of engineering, may be elected to membership in the Club.

SEC. 2. There shall be four classes of members, viz: Honorary, Active, Army and Navy, and Junior. SEC. 3. An Honorary Member shall be a person of

SEC. 3. An Honorary Member shall be a person of broadly acknowledged eminence in the field of the activities of the Club.

SEC. 4. An Active Member shall be not less than twenty-five years of age. SEC. 5. A Junior Member, when elected, shall be at least eighteen years and less than thirty-three years of age.

SEC. 6. An Army and Navy Member shall be a com-

SEC. 6. An Army and Navy Member shall be a commissioned officer in active or reserve service in the United States Army, Navy, or Marine Corps. SEC, 7. All classes of members shall onjoy equal privi-

SEC. 7. All classes of members shall enjoy equal privileges except that only Honorary and Active Members shall be eligible to vote or hold office.

As of January 1937 the membership was as follows:

Cards were issued on request of a member to the women of his immediate household, which gave the holders the privileges of the ladies' reception room and dining room, which rooms were for the sole use of such fadies or members accompanied by ladies. Other parts of the club premises were barred to ladies, except no occasions arranged for by the House Committee. Approximately 199 ladies held cards. Ladies holding cards could bring other ladies as guests.

Under the bylaws of the club an organization, 25 percent of whose members were members of plaintiff club and whose objects and activities enabled them to cooperate with the club, in the opinion of the Board of Directors, might be elected an affiliated organization. Ten such organizations had been elected as affiliates. They were all technical organizations, such as the American Institute of Electrical Engineers, the American Society of Civil Engineers, and the American Society of Mechanical Engineers. Most of them held monthly meetings at plaintiff's clubhouse, ordinarily after dinner, and sometimes committee meetings of plaintiff's affiliates were held in the clubbouse during the daytime. Other technical organizations which were not affiliates of the plaintiff held their meetings in plaintiff's clubhouse. Among such organizations were the American Foundrymen's Association, the Institute of Radio Engineers, and the Society of Professional Engineers.

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Reporter's Statement of the Case

Plaintiff maintained an engineer center in Philadelphia, where all engineers were welcome and where they could hold their meetings after proper arrangements therefor had been made with the plaintiff.

3. About once a month for seven or eight months during the year plaintiff, either alone or in conjunction with one of its affiliated organizations or some other technical society, gave "eyet together" dimens, at which there might be speaking or other form of entertainment, followed by a general social gathering, sometimes including dancing. About once a year some or all of the sfilliated organizations held a similar meeting at the cludy.

Luncheon and dinner were served daily. The luncheons were largely attended, the attendance averaging from 100 to 125 persons. The attendance at dinner was small, except on special occasions.

The club had a glee club of about 30 members, and an orchestra of about 10 members. There were 4 pianos in the clubhouse.

4. Monthly, except during the summer months, plaintiff

issued a publication called "The Announcer," giving the principal activities for the coming month. For a typical year as shown by The Announcer there were 177 meetings in the club, 13 of which were social in the sense they were not devoted to educational, technical, or business purposes, and 164 of which were technical in character.

Plaintiff formerly published a monthly technical maga-

zine called "Engineers and Engineering," but this was discontinued during the depression and has not been revived. 5. Plaintiff owned the premises at 1317 Spruce Street,

which was carried on its books at a value of \$211,500, and it also owned furniture and fixtures which had a book value of \$40,500. The building is a four-story brick, with a frontage of 50 feet and a depth of 163 feet, on which there is an outstanding mortgage of \$125,000, the mortgage bonds being held by members of the club.

On the first floor there were a main lounge, the main dining room, a writing room, a ladies' reception room, and a ladies' dining room. On the second floor were the auditorium with a raised platform, a library with shelves for

449973-42-CC-rol. 95---5

Reporter's Statement of the Case 3,500 technical books and space for technical magazines, the Green Room, the Gold Room, the Secretary's office, and the Board of Directors' Room. On the third floor were a room used for storage and also for mimeographing work, a room used by the technical service committee, and a room for the Junior Section. The rest of the third floor was taken up with seven sleeping rooms. The fourth floor, west side, was taken up with nine sleeping rooms, and on the east side by a classroom. In the basement were washrooms, a pool table, a billiard table, and four card tables, and a bar. The rooms were comfortably and attractively furnished. Most of the bedrooms were rented to the members by the month, but there were usually four or five rooms available for overnight guests.

Available in the lounge were four local newspapers, two New York newspapers, and ten popular magazines. A cigar stand was maintained in the lobby.

6. The staff of the club consisted of a secretary and three assistants, an accountant and one assistant, a librarian, three desk men, a doorman, two porters, a maintenance man or engineer, a steward, a chef and assistant chef, a pantryman, two dishwashers, a head waitress and five waitresses, and one bartender. Extra help was engaged as needed in the winter. An average of 30 people were employed.

7. The average yearly income of the club for the period from July 1935 to January 1938 was \$89,575. Out of each \$100 of income, the restaurant yielded \$35.14, the bar, \$11.48, billiards and pool, \$0.11. The support of the club came primarily from membership dues.

8. Plaintiff paid the dues tax until 1921 when the then Commissioner of Internal Revenue ruled that it was not a social club and not taxable as such and the tax that it had paid was refunded. In 1939 the then Commissioner of Internal Revenue ruled it taxable as a social club.

9. During the period from July 1935 to January 1938. both inclusive, plaintiff paid to the defendant as taxes on dues and initiation fees of its members a total of \$6.261.43. made up of the following payments:

3

Period	Tax	Date paid		Period	Tax	Date paid	
1935				1807			
July				January		Mar.	
August		Oct.	2, 1938	Pebruary		Apr.	2, 1993
September	246.59	Nov.	4, 1935	March	\$10.55	May	4, 1907
October	145, 32	Dec.	4, 1935	April	872, 61	June	3, 1977
November	50, 94	Jan.	8,1995	May	170, 56	July	8, 1991
December	100, 29	Feb.	4, 1995	June	86,82	Aug.	8, 1907
				July	165.45	Sopt.	3, 1933
1936				August	66, 21	Oss.	5, 1937
Jacoury	126, 26	Mor.	4,1936	Sentember	277, 81	Nov.	4, 1937
February	47, 22	Arr.	3,1906	October	131, 49	Dec.	4, 1937
March	660, 61	Max	4.1906	November	74.76	Jan.	£ 1995
April	600, 59	Jone	3, 1980	December	81.44	Feb.	5, 1836
May	150.00	July	1, 1956				
June	140.21	Aur.	4, 1936	1938			
July	120, 29	Sept.	3, 1936	Jacobset	115.90	Mar.	3, 1986
August		Ovt.	2, 1936				
September	203, 88	Nev.	4, 1956		ì		
October	140.41	Dec.	2, 1955				
November	88, 30	Jan.	6, 1997	1	1		
December	61.27	Feb.	2, 1937			1	

A claim for the refund thereof was filed by plaintiff on March 17, 1938, based on the following:

Opinion of District Court, Eastern District of Pennsylvania, filed September 3, 1837, copy attached, holding this club not subject to tax under Section 501, Revenue Act of 1926, as amended.

Before acting upon the claim the Commissioner demanded the submission of powers of attorns by the members of the club, authorizing the club to act as their spent in the collection of the taxes. Phinniff took the position that collection of the taxes. Phinniff took the position that claim is a submission of the collection of the collection of the collection of this court in Butlears (Tub of Othogo v. Tulend States, 80 C. Ch. 508, 14 F. Supp. 1030, but upon continued demand therefore requested an extension of time within which to secure powers of attorney. The Commissioner refused this extension of the within which to severe the claim on the ground that such powers of attorney had not been furnished. On the same day sait for the recovery of such taxes was filled in this court.

On March 29, 1939, the Commissioner wrote plaintiff a further letter rejecting the claim, which letter concluded as follows:

The directory issued by the Club, March 1, 1937, sets forth that the following are the advantages of membership:

bership:
Headquarters for Technical and Engineering
Activities in Philadelphia.

Industrial and civic problems involving technical and engineering questions are considered and

discussed.

A spacious lounge, current periodicals, comfortable library, well managed restaurant, excellent cooking, very reasonable prices, are worth-while

attractions.

Thirty-day cards extend every privilege to outof-town friends.

Convenient central city club home to meet and entertain friends and acquaintances.

Ladies enjoy separate lounge room and restaurant.

Private dining rooms available for special

parties.

Ladies, families and friends participate in frequent evening events which are pleasurable and

interesting.

Membership card carries House and Library privilege in many Engineers clubs and organizations throughout the United States.

Rooms available for members and their transient guests.

Ask your friends, associates and co-workers to become members that they may enjoy the benefits.

For what you pay in tips at other restaurants you can maintain a membership in the club. Low dues—Low prices—"no tips."

In view of the fact that one of the purposes of the theb is social intercourse and in view of the actial features and advantages offered to members, as set forth above, it is held that, for the period involved in the claim, the club qualified as a social club or organization within the meaning of section 501 of the Revenue. Act of 1 as amounted by section 510 of the Revenue Act of 1 as amounted by section 510 and an initiation fees in the club were subject to the tax and initiation fees in the club were subject to the tax

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imposed by that section of the Act. Furthermore, the claim of the club for refund of the tax collected from its members and paid over to the Government may not be allowed in any event unless the requirements of article 54 of Regulations 43 that powers of attorney showing the authority of the club to claim a refund on behalf of the members who paid the tax be submitted to the Commissioner in support of the claim are complied with.

Plaintiff's directory issued March 1, 1937, contained the language quoted by the Commissioner in the foregoing letter.

10. On May 14, 1986, two suits were filed by plaintiff in the United States District Court for the Eastern District of Pennsylvania, one against W. J. Rothensies, Collector of Internal Revenue, and the other against the defendant, United States of America. The suit against the Collector sought a refund of taxes on initiation fees and dues paid by plaintiff for the months of March to June 1935, and the suit against the United States sought a refund of taxes on initiation fees and dues paid by plaintiff for the months of January 1932 to February 1935, both inclusive. Both suits were filed on the ground that plaintiff was not a social club.

Both defendants defended upon the sole ground that plaintiff was a social club. Judement was entered for plaintiff in each suit for the amount of taxes collected and interest, pursuant to an unreported opinion filed by United States District Judge Kirkpatrick. In the opinion the sole question discussed was whether or not plaintiff was a social club. On this issue the court found:

1. The predominant purpose of the Organization is not a social one. As expressed by its charter, the predominant purpose is to promote the arts and sciences

connected with engineering.

2. The Club has social features which, as well as I can estimate it, constitute some ten or twelve percent of the sum of the activities, interests, and club life of its members

3. The social features of the Club are subordinate and merely incidental to the active furtherance of the

predominant purpose.

4. The social features of the Club are not a material purpose of the organization.

Certain conclusions of law have to do directly with the foregoing findings, and I will state them specially. 1. The fact that the Club charter, after stating what I have found to be the perdominant purpose of the Organization, adds, "and for social intercourse," does

Organization, adds, "and for social intercourse," does not compel a finding that the social intercourse feature was a material purpose.

These words may have been, and no doubt were, included in order to make the Organization a "club"

included in order to make the Organization a "club" and to regularize the carrying on of the small amount of subordinate and incidental social activities. 2. My finding as to the percentage of social activities

of the Chib would indicate that they form a material part of lits activities. I cannot, however, agree with the defendant that the question is whether or not a naticular than the control of the control of the H that were a, there would be very few clube which would escape taxation, and most of the reported cases would have been differently decided. The question is whether the social features are a material purpose of the control of the control of the control of the ties and still be subordinate and morely incidental to the main purpose. That, I think, is the situation here. Appeals from aski pidgements were perfected and trans-

script of record filed. Subsequently, a settlement was effected whereby plaintiff accepted the principal amounts of the judgments and waived interest. As a result of the settlement, the appeals were dismissed. The principal amount of the judgments totalling \$11,672.90 was paid, and interest in the total amount of \$43,20.88 was waived by plaintiff.

During the period involved in the suits before the District Court and the period involved in this suit plaintiff's charter and its purposes and activities were of substantially the same nature and extent.

12. Social activities constituted a material purpose of plaintiff club, and an important and substantial part of its activities during the period here in question.

The court decided that the plaintiff was not entitled to recover.

Madden, Judge, delivered the opinion of the court: Plaintiff sues to recover taxes paid by it which were levied by the defendant upon it pursuant to Section 501 of the Opinion of the Court
Revenue Act of 1926 as amended by Section 413 (a) of the
Revenue Act of 1928.

The section is as follows:

SEC. 413. CLUB DUES TAX.
(a) Section 501 of the

(a) Section 501 of the Revenue Act of 1926 is amended to read as follows: "Sec. 501. (a) There shall be levied, assessed, col-

lected, and paid a tax equivalent to 10 per centum of any amount paid—

(1) As dues or membership fees to any social, ath-

letic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of \$25 per year; or

"(2) As initiation fees to such a club or organization, if such fees amount to more than \$10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of \$25 per

year. "(b) Such taxes shall be paid by the person paying such dues or fees.

\* \* (U. S. C., Title 26, Secs. 950, 951, 952.)
 Article 36 of Regulations 43, first promulgated in 1917, and

in effect since that time, is as follows: ART. 36. Social Clubs.-Any organization which maintains quarters or arranges periodical dinners or meetings, for the purpose of affording its members an opportunity of congregating for social intercourse, is a "social " " club or organization" within the meaning of the Act, unless its social features are not a material purpose of the organization but are subordinate and merely incidental to the active furtherance of a different and predominant purpose, such as, for example, religion, the arts, or business. The tax does not attach to dues or fees of a religious organization, chamber of commerce, commercial club, trade organization, or the like, merely because it has incidental social features. but, if the social features are a material purpose of the organization, then it is a "social \* \* \* club or organization, within the meaning of the Act. An organization that has for its exclusive or predominant purpose religion or philanthropic social service (or the advancement of the business or commercial interests of a city or community) is clearly not a "social \* \* \* club or organization." Most fraternal organizations are in effect social clubs, but if they are operating under the

Opinion of the Court lodge system, or are local fraternal organizations among the students of a college or university, payments to them are expressly exempt.

The period for which the taxes in question were paid was July 1935 to January 1938. Plaintiff filed a timely claim for refund of the taxes, asserting as the basis for its claim an opinion of the United States District Court for the Eastern District of Pennsylvania. That opinion was rendered in connection with two decisions of the District Court in favor of plaintiff, one against the defendant, covering the period January 1932 to February 1985, the other against one Rothensies, Collector of Internal Revenue, covering the period March to June 1935. In each case the Court held that the taxes paid by plaintiff under the section of the statute here involved could be recovered by plaintiff because it was not, during those periods, a social club for tax purposes. Plaintiff's claim for refund of the taxes here involved was denied by the Commissioner and plaintiff brought this enit

Our first question is whether we are free to determine whether or not plaintiff was a social club during the period 1935 to 1938 here in question. Plaintiff save we are not: that the question of social club vel non is res indicata by reason of the District Court decisions.

In our opinion plaintiff's operations for the period July 1935 to January 1938, were, for tax nurposes, those of a social club. Laving aside the question of res judicata, it would follow from that opinion that the taxes were properly collected, and may not be recovered. That opinion is in accord with many decisions of this court.2 It is urged upon us, however, that regardless of that opinion we are bound to conclude, what we do not believe to be true, that plaintiff's activities were not those of a social club because the District Court decided in other cases, one of which was between the same parties and the other between plaintiff and a collector of Internal Revenue, that plaintiff's activities from January 1932 to February 1935 were not those of a social club.

<sup>1</sup> Hen cases cited infra, note T.

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Plaintiff's activities in the later period, here in question, were not those of the earlier period, previously litigated. They were comparable and similar. We have found that They were comparable and similar. We have found that they were a completely different set of events, and they were not the set of events litigated in the earlier cases. We are saked, then, to close our eyes and minds to the faste statuly before us, and to give to lapiniff a judgment which we would not give to any other plaintiff whose cause of each in a dequal merit. We are asked thus to discriminate with report to a public and recurring duty, the duty to the property of the comparable of the compa

The doctrine of res judicata should not be so extended. Any application of the doctrine in tax cases to relieve a taxpayer of, or to subject him to the payment of, a tax in a later year because of litigation with reference to an earlier year, has been criticized.2 A learned commentator has pointed out that the invocation of the doctrine in tax cases has promoted litigation instead of producing peace, as the doctrine is supposed to do." The instant case is an example. In addition to trying the facts of plaintiff's operations for the three years here in question, it has been necessary to try again the facts which were tried before the District Court covering another period of years, in order to determine whether they were so substantially similar that the doctrine of res judicata would have to be considered. The learned authority cited above suggests the following approach to the question:

Where different taxable years are involved in the two cases, res judicate should be applied much more narrowly than has been true in some cases in the peat. Not only should it be confined to issues which are identical in the two cases, but the word "identical" where the applicable statute is unchanged and all of the controlling events occurred before the earlier of the tax years.

Griswold, op. cif. at p. 1257.

<sup>\*</sup>Report of Committee on Federal Tainstien of the American Bar Association, 61 A. B. A. Rep. 821 (1938). \* Grisvold. Res Judicata in Tax Cases, 46 Yale L. J. 1320 (1937).

Opinion of the Court
This suggestion seems to us to be wise.

As to the suit in the District Court against the Collector, for the period March to June 1805, immediately preeeding the period covered by the present suit, the conclusion of the Supreme Court in Bankers Perchantas Coal Co. v. Burnet, Commissioner, 287 U. S. 308, is that a judgment in a suit against a collector is not ree judicata in a later suit against the Commissioner or the United States, because of

a lack of identity of parties.

In the other case in the District Court, the parties were identical with the present parties. But the facts were, as identical with the present parties. But the facts were, as similar, set of events. They comission of a whole course of conduct from day to day in all its details of an enterprise of conduct from day to day in all its details of an enterprise of considerable soops. They were the kind of events who, though similar, might easily vary from period to period to the product of the considerable soops which were the considerable soops which

statute. The decided cases do not apply the res judicata principle to such situations. In the case of Tait v. Western Maryland Ru. Co., 289 U. S. 620, the events were as follows: Two predecessors of the railway company had, before 1908 and in 1911, issued and sold at a discount their mortgage bonds In 1917 the newly formed railway company recognized these outstanding bonds as its obligation. It claimed the right to a deduction from its gross income for income tax purposes for 1918 and 1919 of an amortized proportion of the discount. The Commissioner of Internal Revenue disapproved the deduction, but on litigation through the Board of Tax Appeals and the Circuit Court of Appeals, the Company's position was sustained. The Company later claimed and sned for refunds for the tax years 1920-1925, the statute, regulations and question at issue being the same. The Supreme Court held that the principle of res judicata was applicable. In that case the events sought to be tried in the second suit were the identical historical events which had been tried in the first. The application of the doctrine of res indicata in such a case is not a precedent for its application here. Other Supreme Court cases have not shown any tendency to extend the scope of the principle in tax cases. Nor have the other Federal Courts applied the principle in cases fairly comparable to this case.

We conclude, therefore, that we are free to determine whether plaintiffs activities for the year in question were those of a social club. As already indicated in this opinion, we think they were. The findings of fact show that the social features of the club were not merely incidental, but were a material purpose of the club and an important and substantial part of its activities. This court has frequently held that such clubs are taxable.

In view of our conclusions as to the non-applicability of resjudicata, and as to plaintiff being a social club, it is not necessary for us to re-examine the question of whether the regulation requiring plaintiff to file powers of attorage from its members in connection with the claim for refund was valid. We therefore state no conclusion upon that question.

Plaintiff's petition will be dismissed. It is so ordered.

Jones, Judge; Littleton, Judge; and Whaley, Ohief Justice, concur.

WHITAKER, Judge, concurring:

I concur in the result reached, but for different reasons. I think the decision of the District Court for the Eastern District of Pennsylvania, holding that this taxpayer was not a social club, is rea judicate in this proceeding and precludes us from inquiring whether or not it was in fact a social club. I think we are required to so hold by the decision of the Supreme Court in Tail v. Western Maryland

<sup>&</sup>lt;sup>8</sup> United States v. Stone & Downer Co., 274 U. S. 225; Bankers Pocohesios Cool Co. v. Barnet, Commencement 287 U. S. 368.

"See 130 A. L. B. 374 for a collection of the authorities. The District Court for the Western District of Pennsylvania has recently declined to apply the

Gottrine to a case like the present one. Daysease Club v. Bell, 1941, C. C. H., par. 8368.

\*Fieler v. United States, 68 C. Cls. 220; Army and Navy Club v. United States, 72 C. Cls. 684; Wichita Commercial and Social Club day. v. United

Etates, 72 C. Cis. 681; Wichta Commercial and Social Club Ass. v. United Etates, 77 C. Cis. 50; Union League Club v. United States, 78 C. Cis. 351; Obicaço Singheore Club v. United States, 50 C. Cis. 615, 521; The Lemba v. United States, 51 C. Cis. 216; Century Club v. United States, 51 C. Cis. 678; Duyurum Club v. United States, 57 C. Cis. 40;

Conserving Opinion by 544s withther
Railway Co., 289 U. S. 629, 623. The testimony in this case
is uncontradicted that the purposes and activities of the club
in the year now before us were the same as in the year before
the District Court. This being true, the judgment in the
former proceeding, that the plaintiff was not a social club,
is conclusive here. Tait v. Wastern Maryland Railway Co.,
seyers, so holds.

suppri, 30 notes.
But the defendant in this proceeding interposes a defense not raised in the case in the Detrict Court, and this it may be not raised in the case in the Detrict Court, and this it may be not raised in the case of the court of the court

Pennsylvania. The right of a club to maintain an action for the refund of taxes paid on initiation fees and dues has been before this court twice before. In Alliance Country Club v. The United States, 62 C. Cls. 579, we held that a club was entitled to maintain a suit to recover taxes paid on initiation fees and dues imposed upon its members. In that proceeding the court had under consideration section 801 of the act of November 23, 1921 (42 Stat. 227, 291), but the provisions of that act are the same as the act here under consideration (sec. 501 of the Revenue Act of 1926, 44 Stat. 9, as amended by sec. 413 of the Revenue Act of 1928, 45 Stat. 791, 864). insofar as is material here. Both that act and the act before us provide that the taxes are to "be paid by the person paying such dues or fees." After having quoted the provision of a regulation issued by the Commissioner of Internal Revenue on March 28, 1919, providing that as a condition precedent to the right to claim a refund the club must furnish a sworn statement that no claim for refund had been filed by its members, this court said:

Concurring Opinion by Judge Whitaker

So it seems that the Treasury Department recognizes and treasts the club as the taxpare, both as the proper party to pay the tax and also as entitled to recover the tax if the same has been illegally or erroneously paid. We are of the same opinion, and therefore think there is nothing in the contention of the Government that the plaintiff is not the proper party to bring this section.

Later, the regulation quoted in that case was changed, and there was adopted instead the regulation now in force requiring the filing of powers of attorney by the members of the club. After this change, there came before us the case of Builders' Club of Chicago v. United States, supra, in which the Commissioner of Internal Revenue refused to refund to the club the taxes alleged to have been erroneously collected for the same reason now advanced in this case, to wit, that the club had failed to file powers of attorney executed by its members authorizing the club to act as their agent. This question was carefully considered by the court, and we held that the club was entitled to maintain an action for the refund of the taxes, notwithstanding the fact that it had not filed such powers of attorney. We said that the requirement that such powers of attorney be filed was "legislation in the guise of a regulation and therefore invalid,"

When demand was made upon the plaintiff in this case by the Commissioner of Internal Revenue for the furnishing of powers of attorney, the plaintiff insisted that it was not required to do so, expressly stating that it relied upon our decision in Builders' Club of Chicago v. United States. supra. The defendant replied that the regulation was nevertheless still in force and insisted upon compliance with it. A month later plaintiff's attention was called to the fact that the powers of attorney had not been received and it was notified that they must be sent in within thirty days. Before the expiration of this time plaintiff wrote defendant stating it would be impossible to secure powers of attorney from all of its 1,000 members within that time, and requested an extension until January 8, 1939, a period of about two months, within which to do so. This request was refused and plaintiff was requested to send on such powers

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as were then on hand. Apparently this was not done, and a month and a half later the claim was rejected for this omission.

Was the Builders Club case correctly decided! The Act under consideration there and here expressly provided that the taxes were "to be paid by the person paying unch dues or fees." The Club was required to collect the tax from its members and remit it to the defendant, but the member was the taxpayer, that is, the person on whom the tax was levied, and not the club. Therefore, any refund of a tax paid by a member is a refund due the member and not the club. The club has no right to it. If it secrees the refund, of the club club club club club. The club has no right to it. If it secrees the refund, otherwise.

If this be correct, then it follows that the regulation of the Treasury Department requiring as a condition precedent the filing by the club of powers of attorney from its members authorizing it to act for them is a valid regulation.

The Builders Club case followed the Allience Country Club case, decided ten years calling; in which it was hold that the club was the taxpayer, the ground of the decision that the club was the taxpayer, the ground of the decision the provision that the club was made liable for the tax whether it discharged its duty of collecting it or not; but I think there are no no doubt that it is on the member, and not on the club, that the tax is level and, therefore, and who, therefore, is entitled to the refund.

This is consistent with what we said on the motion for a new trial in the case of Busker HIM Country Club v. United States, 80 C. Cls. 375, 385, 10 F. Supp. 139. In that case suit was brought to recover taxer paid on initiation fees and dues collected by the Club from its members and remitted to the Government, on the theory that it was not a club, but a profit—making concern. In our opinion on motion for a new trial we said.

On the contrary, the tax on the dues was paid to the corporation merely as an agent to remit the amount so paid to the Government. The findings show that the plaintiff "collected" the tax, entered it on its books

under a separate account as payable to the United States, and remitted the same to the collector. Whatever view we may take of the relation of the club members to the corporation, no tax on the dues was paid by the corporation out of its own funds, and no cause of action accrued to it against the Government.

This is also consistent with our decision in Twensticth Century Sporting Olub v. United States, 92 C. Cls. 93, 24 F. Supp. 1021. The plaintiff in that case sought to recover taxes on admissions to boxing bouts. We denied recovery, saying—

But even though the plaintiff had in fact borne the burden of the tax, it nevertheless was not the taxpayer; no taxes were exacted from it by the defendant and there is, therefore, no right given to it under the law to recover. " " " it was the purchaser of the ticket who paid the tax and, therefore, it is only he who has the right to maintain an action to recover.

This was in line with the decision of the Fifth Circuit Court of Appeals in Reports of University System of Georgia v. Page, 81 F. (24), 977. In this case the plaintiff brought sait to recover admission taxes paid on admissions to football games held by it, on the theory that it was a governmental agent of the State of Georgia and, therefore, could not be assessed at tax by the Felderal Government. On the Court of the Court of the Court of the Court of of Appeals on the grounded at the Fifth Circuit Court of Appeals on the grounded at the Court of the Court and on page 580:

While vigocously denying at all times that any demission star is due, the appellent first paid it and ought to recover it through administrative chan-admission is an excise which is added to the price of admission and paid by the purchaser of the ticket. Access was actually borne by it, applicable has no interest in the subject-nature of the controversy and cannot access as actually borne by it, applicable has no interest in the subject-nature of the controversy and cannot access as a sixtual state of the controversy and cannot access as a sixtual state of the controversy and cannot access a sixtual state of the controversy and cannot access the control of t

One of the Control of the United States (Ct. Cts.) 2 F. Supp. 02; Woordook v. Recker (Ct. Cts.) 2 F. Supp. 02; Woordook v. Recker (Ct. Ct.) 0.0, 76 L. Ed. 1285. The admission tax statute (44 Stat. 01, eec. 00, as amended) provides that the tax is "to be paid by the person paying for each admission." It further provides (44 Stat. 9, eec. 2) that mission." It further provides (44 Stat. 9, eec. 2) that mission."

In Shannopin Country Club v. Heiner, 2 F. (2d) 393, the club brought suit to collect taxes paid on membership certificates. A demurrer was filed on the ground that the club was not the taxpayer. The court said:

The revenue laws of the United States, under which this tax was assessed and collected by the plaintiff, impose this tax upon the members, and not upon the club itself. Section 801 of the Revenue Act of 1921 (42 U. S. Statutes, 291 Comp. St. Ann. Supp. 1923, sec. 6309-5/8bl). Under this law, there is no primary money liability upon plaintiff to pay this tax. It had no burden, other than acting as collecting agent for the government in collecting the amount of taxes imposed by section 801 of the Revenue Act of 1921. This duty is made clear by section 802 of the Revenue Act of 1921 (42 U.S. Statutes 1921, p. 291 [Comp. St. Ann. Supp. 1923, sec. 6309-5/8cl), which clearly fixes the liability and responsibility of the plaintiff as far as the collection of these taxes is concerned. The plaintiff itself has paid no part of the taxes which it is now seeking to recover, and if it were permitted to recover judgment in this action, it would not in our opinion bar another action by the members themselves, who are the real parties in interest. If the taxes involved in the plaintiff's statement of claim were illegally assessed and collected from the members of the plaintiff corporation, they are the parties injured, and are the ones entitled to recover. There is nothing in the statement of claim which discloses that the plaintiff itself is a taxpayer and has paid any tax to the Government which it now seeks to recover.

No appeal was taken from this decision.

The Seventh Circuit Court of Appeals in Wild Wing Lodge v. Blacklidge, 59 F. (2d) 421, held the taxpayer to be the person paying initiation fees and dues, and not the club to which they were paid. In the following cases various courts have recognized that the club member was the tapayer, although in none of them was this question directly involved: Munav. Bosers, 47 F. (2d) 204 (C. C. A. 2d); Fleming v. Peinecke, 52 F. (2d) 449 (C. C. A. 7th); Foran v. McLaughlin, 59 F. (2d) 158 (C. C. A. 9th); MacLaughlin v. Williams, 52 F. (2d) 244 (C. C. A. 3d)

The Treasury Department has consistently held that the club member, and not the club, was the taxpayer. As far back as 1920 it required a club seeking a refund to file a sworm statement that no claim for a refund had been field by any of its members, and in 1926 in article 15 of regulation 48, next 2, it said:

\* \* Inasmuch as the tax on dues and initiation fees is paid by the person who pays the dues and fees (see, 501 of the Act) it follows that any refund of the taxes can be legally made only to the club member that the second of the second of the second of the the duty of collecting the tax and paying it over to the collector but it is not the taxpayer within the meaning of the law. Consequently, the dub has no legal fees paid by its members.

There has been no departure from this provision. The regulations today provide:

 the members and not the clubs are the actual taxpayers.
 Sec. 101.56 Regulations 43, Revised 1940.)

I know of no decision to the contrary, except our own. I am of the opinion that the *Builders Club* case was erroneously decided and should be overruled.

In the Builders Club case we said this regulation requiring cubs to file powers of attorney from their members was invalid and need not be complied with. This taxpayer relied on what we said and did not comply with it. It now asks us for relief. Can we deny relief because it failed to comply with a regulation with which we mad it need not comply? Were this a court of last resort, I should be inclined to say that the plaintiff and a right to rely on our former

say that the plaintiff had a right to rely on our former decision and would be excused from complying with a regulation we had held to be invalid. But this is not a court of last resort. Other courts may diagree with our view of the har, and constillents do. They are not beauth thereby. They and no one has a right to complain that they did not follow our decision. The Freasury Department is not bound by our decisions. It has the right in other cases to persist in the view of the law and to undertake to have its views sustained by other courts. It has the right to persist in lat view of the law and to undertake to have its views sustained by other courts. It has the right to persist in lat view until it is finally rejected by the Supreme Court. It constrate to us that we were wrong in our prior decision. And, convinced four error, it is our plain duty to correct it.

And, convinced of our error, it is our plann duty to correct it.

Bat, it is charged with bat knowledge. That beling so, was it entitled to rely on our decision in the Builders Olds case! If not, it cannot complain if we should refuse to follow it. That opinion did not make the law, as an other of the superior of the superior Court vehicle and there does. It is not precedent, it was advisory only. It did not settle the law, as of the law, as an of the law is committed to the Supreme Court vehicle. The final declaration of the law is committed to the Supreme Court. Until that our times to make you of the law is committed to the Supreme Court. Until that one of the law is committed to the Supreme Court. Until that one of the law is committed to the Supreme Court. Until that one of the law is committed to the Supreme Court. Until that one of the law is committed to the Supreme Court. Until that one of the law is committed to the Supreme Court with fillings the new forms of the law is committed to the Supreme Court. Until that the law is committed to the Supreme Court with fillings that the law is committed to the Supreme Court with th

So when the plaintiff was confronted by the continued initiations of the Treasury Department that it comply with this regulation, it could refuse to do so only at its peril. The decision of this court graw it no absolute assumance that the continued of the contract of the court of the court of plaintiff were appealing to some other court, our prior decision would not deford it protection. It must follow that is in not entitled to protection bers, because the law before us it has man set it is before other court. Courts may differ in their view of what the law is, but when the law has been in their view of what the law is, but when the law has been it is most of the court of the court of the court of the I cannot be one thine before with court and accorder thing

Our prior decision having been erroneous, as I think, and the regulation having been valid and plaintiff not

before some other court.

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Reporter's Statement of the Case having complied with it, I think that it is not entitled to recover.

I concur in the result reached by the majority for the foregoing reasons.

## MIDPOINT REALTY COMPANY, INC., v. THE UNITED STATES

(No. 43130. Decided December 1, 1941)

On the Proofs

Income tax: affiliated grown of corporations: statute at limitations --Where the Commissioner of Internal Revenue on September 9. 1920, transmitted a letter to Salmon Realty Corporation and its affiliated corporations, including the plaintiff, setting forth the Commissioner's determination of the tax liability of the affiliated group for the calendar year 1924; and where said statement agreed with the statement of liability submitted on July 19, 1929, by plaintiff; and where, thereafter, by letter dated September 11, 1981, the Commissioner advised Salmon Realty Corporation and its various affiliated corporations, including the plaintiff, that the refund of certain of the overassessments set forth in suld letter of September 9, 1929, was barred by the statute of limitations, it is held that the statute of limitations had run against the refund payments made by plaintiff on March 13, 1925, and on June 15, 1925, but it had not run as to payment made on September 14, 1925.

not run as to payment made on September 14, 1925. Sense; account afactéd.—It is ledd that there was an implied promise on the part of the Commissioner to refund the payments made on September 14, 1925, against which the activite of limitations had not run and the plaintiff is accordingly estitled to recover, under the provisions of settled 231 (a) of the Revenue act of 1924 and section 234 (a) of the Revenue Act of 1926 and section 234 (a) of the Revenue Act of 1926.

Some.—The facts support the allegation that there was an implied promise to pay on the part of the Commissioner; and plaintiff, having sued on this implied contract within six years, is entitled to recover.

The Reporter's statement of the case:

Mr. Elleworth C. Alvord for the plaintiff. Mr. Floyd F. Toomey and Alvord & Alvord were on the briefs.

Mr. J. W. Hussey, with whom was Mr. Assistant Attorney General Samuel O. Clark, Jr., for the defendant. Mesers. Robert N. Anderson and Fred K. Dyar were on the brief. In this case, as stated in the opinion of the court pack, a decision was remodered, January S, 1900, and a judgment in the sum of \$3.540 was entered for the plaintiff. Therepon the defendant field a motion for new trial on the state of the contract of the contract of the contract pack of the contract p

Subsequently on plaintiff's motion for a new trial the court on October 7, 1840 (91 C. Cls. 684), ordered that submotion be allowed and that the special findings of fact and the opinion of the court filed on January 8, 1840, as amended by the opinion filed April 1, 1940 and the judgment dismissing the petition April 1, 1940 (90 C. Cls. 335, 345), be vacated and withdrawn.

The court further ordered that the case be remanded to the General Docket and that unless the parties should be able to stipulate as to certain facts, set out in the order, the case be referred to a commissioner for the taking of testimony as to said fact.

The court, on December 1, 1941, upon the basis of the stipulation of facts entered into by the parties, the evidence adduced, and the report of a commissioner, made special findings of fact, as follows:

1. The plaintiff is a corporation organized under the laws of the State of New York, with its principal office and place of business in that State. During the calendar year 1994 it was affiliated with and was a subsidiary of Salmon Realty Corporation (now known as the Woodside Improvement Company). a Delaware corporation.

2. On June 15, 1925, plaintiff filed a separate income tax return for the calendar year 1924 disclosing a total tax liability of \$15,855.55, which was paid as follows:

MIDPOINT REALTY COMPANY, INC. Reporter's Statement of the Care On June 15, 1925 3, 677, 78 On December 10, 1925

Total \_\_\_\_\_\_ 15, 205, 56

On the same date, a consolidated return for the calendar vear 1924, disclosing a total tax liability of \$86,519.80, was filed by Salmon Realty Corporation for itself and various affiliated corporations, not including the plaintiff. Said amount was paid on or before December 10, 1925.

3. On June 9, 1927 the Commissioner of Internal Revenue requested information relating to the question whether the Salmon Realty Cornoration and various of its affiliated corporations, including the plaintiff, were "affiliated" within the meaning of section 240 (c) of the Revenue Act of 1924.

4. Pursuant to that request, on July 29, 1927 the Salmon Realty Corporation, for itself and its affiliated corporations,

including the plaintiff, filed with the Bureau of Internal Revenue a statement, sworn to by Albert T. Hunter, Secretary of the Salmon Realty Corporation, reading in part as follows:

STATE OF NEW YORK. County of New York, ss:

Albert T. Hunter, being duly sworn, deposes and says: That he is Secretary of Salmon Realty Corporation: that he makes this affidavit as requested in and in reply to a letter addressed to the Salmon Realty Corporation. dated June 9, 1927, from the office of the Commissioner of Internal Revenue, Washington, D. C.

I. At least ninety-five per cent (95%) of the voting capital stock of the following corporations was acquired on the dates set opposite their names:

Midpoint Realty Co., Inc.—Prior to January 1, 1924. Bryant Park Building, Inc.-Prior to June 1, 1925. Hamilton Leasing Co., Inc.-Prior to June 1, 1925.

As to Midnoint Realty Co., Inc., through a misunderstanding this return was not included in our consolidated income-tax return prior to the year 1925; but we Reporter's Statement of the Case are now preparing a revised statement to be filed for the years 1922, 1923, and 1924, showing proper adjustment for its inclusion.

(Signed) Albert T. Hunter. Sworn to before me this 29th day of July 1927.

(Signed) R. M. Geraer.

5. Thereafter the Commissioner of Internal Revenue determined that the plaintiff was affiliated with Salmon Realty Corporation and its various other subsidiary corporations for the calendar year 1924, and proceeded to determine the tax liability of the group for that year in accordance with section 240 of the Revenue Act of 1924.

6. As a result of the foregoing, on July 19, 1920 the Commissions of Internal Revenue transmitted a letter to the Salmon Realty Corporation and its affiliated corporations, including the plantiff, setting forth his determination of the correct income-tax liability of said corporations for the correct income-tax liability of said corporations for the said to the said to the said of the said to the said the said to the sa

7. Upon receipt of the above-neutroned letter of July 19, 1202 the officers of the Schnom Renkly Corporation and its affiliated corporations, including the plainift, examined the amen and found that the aggregate overnassement of assume and found that the aggregate overnassement of the "Tax Pewfoundy Amended" and the "Corrected Tax Links and the "Corrected Ta

 The Commissioner of Internal Revenue adopted plaintiff's figures and on September 9, 1929 transmitted a letter to Salmon Really Corporation and live various affiliated corporations, including the plaintiff, setting forth his deterporations, including the plaintiff, setting forth his deterced by the control of the control of the control of the calendar year 1954. There was forwarded with said letter a revised statement showing that the correct tax liability of the plaintiff for the calendar year 1950 was 88,138,050. In the tax previously assessed was \$15,265.05; and that there was an overascensement of \$9,310.0. Said statement con-

Certificates of Overassessment for the amounts shown above will be issued through the office of the Collector of Internal Revenue for your district, and will be applied by that official in accordance with the provisions of Section 284 (a) of the Revenue Act of 1926.

Said letter enclosed a new form of "Agreement as to Final Determination of Tax Liability" (Form 866).

 Salmon Realty Corporation and its various affiliated corporations, including the plaintiff, duly executed and transmitted to the Commissioner of Internal Revenue by letter dated October II, 1929 said form of "Agreement as to Final Determination of Tax Liability" (Form 866).
 Said letter read as follows:

We return herewith duly signed, as requested in your here of Sequences is 1002 (Symbols 17, Ale-D., kay), of test of Sequences in 1002 (Symbols 1002,

This particular form was not approved by the Secretary of Treasury by reason of the fact that it was determined by the Commissioner that a different form should be used. 10. Thereafter, by letter dated September 11, 1981, the Commissioner of Internal Revenue advised Salmon Realty Corporation, and its various affiliated corporations, that the refund of certain of the overassessments set forth in said letter of September 9, 1929, including the amount of \$9.91.86 overpaid by the plaintiff, was barred by the statute of limitations.

11. On June 5, 1933 a new Form 896 was mailed to the plantiff based in part upon the determination of the Commissioner of Internal Revenue set forth in his aid letter of September 9, 1920 that there was an overassemment of income taxes paid by the plantiff for the calendar year 1924 in the amount of 89215.08. Said form was duly executed by Salmon Realty Corporation and its affinited corporations, making the plantiff, 2014 control of the part of the calendar of the part of the company of the calendar of the calendar of the rations to the Commissioner of Internal Revenue by letter dated August 1, 1920.

12. On November 22, 1933 the Secretary of the Treasury approved the form of "Agreement as to Final Determination of Tax Liability" (Form 560) transmitted with said letter of August 1, 1938, approval thereof appearing on schedule 7037. Thereafter, the Diabursing Officer of the Treasury prepared a check drawn on the Treasury of the United States in payment of the full amount of \$9,321.652 corpural by the plaintiff Motjonia Really (Company, Inc., for the year 1968), as set forth in the Commissioner's letter of September 3, 1959, (option with Interest thereon as provided the property of the Commissioner's provided the commissioner's letter of September 3, 1959, (option with interest thereon as provided the commissioner's provided the commissioner's provided the commissioner's provided the commissioner's letter of September 3, 1959, (option with interest thereon as provided the commissioner's provided the commissioner's provided the commissioner's provided the commissioner's letter of September 3, 1959, (option with interest thereon as provided the commissioner's provided the commissioner's letter of September 3, 1959, (option with interest thereon as provided the commissioner's provided the commissioner's letter of September 3, 1959, (option with interest thereon as provided the commissioner's letter of September 3, 1959, (option with interest thereon as provided the commissioner's letter of September 3, 1959, (option with interest thereon as provided the commissioner's letter of September 3, 1959, (option with interest thereon as provided the commissioner's letter of September 3, 1959, (option with interest thereon as provided the commissioner's letter of September 3, 1959, (option with interest thereon as provided the commissioner's letter of September 3, 1959, (option with interest thereon as provided the commissioner's letter of September 3, 1959, (option with interest thereon as provided the commi

12. On receipt of said check for approval the Comptroller General disallowed \$8,277.88 of the principal amount set forth in said letter of September 9, 1929 as no overpayment by the plaintiff for the year 1924, on the theory that a timely claim for refund had not been filed with respect to that part of said overpayment.

14. On February 9, 1934 the sum of \$3,837.77, with interest thereon to January 23, 1934, was refunded to the plaintiff. Likewise, on February 9, 1934, the Commissioner of Internal Revenue mailed to the plaintiff. Midpoint Realty Company. Inc., a Certifice of Overassessment (No. 2289066; Schedule IT : 0.1921), setting forth that the overassessment of the plaintiff for the calendar year 1924 was in the amount of \$9,21.6.0, but that of such amount only \$8,35.7.7 was refundable, refund of the vannidate being asserted to be barred by the statute of limitations. No part of the balance of \$5,577.85 has been refunded or credited to the plaintiff.

15. Henry B. Fernald represented the Salmon Realty Corporation and its affiliated corporations before the Bureau of Internal Revenue in connection with the determination of the tax liabilities of the affiliated group for 1923, 1924, and 1925. Shortly after July 19, 1929 he was furnished with a copy of the letter of July 19, 1929 addressed to the Salmon Realty Corporation. Upon examining this letter he found that the amount of \$199,391.97, stated in the "Agreement as to final determination of tax liability" as the corrected total tax liability, failed to include the correct tax liability of any of the subsidiary corporations of the Salmon Realty Corporation for the year 1925, although it included the corrected tax liability of the parent corporation (Salmon Realty Corporation) for that year. Fernald then prepared, as the authorized representative of the corporation, a schedule consisting of six pages. It showed "Total tax liability" of \$271.031.94. exclusive of interest. It also showed "Allocation of Correct Tax" to each corporation for each of the years 1923, 1924, and 1925, and the amounts "not included in Department Agreement" for 1925. On August 8, 1929 Fernald presented a copy of this schedule to Messrs. Mansell and Whitney, of the Audit Review Division, Bureau of Internal Revenue, at which time Fernald explained to Mansell and Whitney the appropriate revisions which, in his opinion, should be made with respect to the Bureau's letter of July 19, 1929. Fernald was advised by the representatives of the Bureau that they would consider the schedule and that a revised letter would be forthcoming. Also at the conference of August 8, 1929 Fernald personally returned unexecuted the Department's proposed closing agreement to Messrs, Mansell and Whitney, the Bureau conferees. Following this the Commissioner wrote plaintiff on September 9, 1929 approving plaintiff's computation,

Opinion of the Court
The court decided that the plaintiff was entitled to recover.

WHITAKER, Judge, delivered the opinion of the court: Plaintiff's petition in this case was based in part on the theory that within six years prior to the time it brought its suit it and the Commissioner of Internal Revenue had agreed on the balance due it, and that the Commissioner had impliedly promised to pay the amount agreed to be due. In our opinion in this case delivered on January 8, 1940, 90 C. Cls. 335, we held that there had been an account stated, but not on the date alleged in the petition, to wit, September 9, 1929, but on an earlier date, August 8, 1929, and that there had been an implied promise to pay that part of the amount admitted to be due which was not barred by the statute of limitations. Inasmuch as plaintiff alleged that there had been an account stated on September 9, 1929, which was just less than six years prior to the time of the filing of the petition, and since neither party contended that the account had been stated on an earlier date, the defendant did not rely upon the statute of limitations as a defense. But when our oninion was delivered holding that the account had been stated on August 8. 1929, the defendant filed a motion for a new trial raising this defense. We granted the motion and dismissed the petition.

Whereupon the plaintiff filed a motion for a new trial sessering that we were in error in holding that the account had been stated on August 8, 1929, and that if given an operaturily to do so, it could offer further perof to demonstrate this fact. We granted plaintiff's motion and referred the aces to a commissioner to the proof, among other things, as to what happened at the conference between plaintiff and the proof has been taken, and the commissioner reports that on said date plaintiff's representative filed with the Bureau of Internal Revenues schedules setting forth what it believed was the correct computation of its tax liability, which showed an overpayment by the plaintiff of \$820.06.8 for the year in question. Upon the filing of this computation the Commissioner of Internal Revenue's representative advised plaintiff.

Opinion of the Court
that they would consider the schedules filed and that a revised
letter would be forthcoming.

The commissioner of this court finds that on that date, August 8, 1926, there was no agreement as to plaintiff sorrect tax liability. The evidence supports this finding, Plaintiff was not advised that the defendant accepted its computation of its tax liability until receipt of the Commissioner's letter of September 9, 1929. Not until that date, we are now convinced, was there an agreement between the parties as to the amount due plaintiff. The petition in this case

was filed within six years threasface.
The statute of limitations had run against the refund of
the two payments made by the plaintiff on March 13, 1928 and
of June 15, 1925, but it had not run as to the payments made
of June 15, 1925, but it had not run as to the payment with
the part of the Commissioner to refund the payments against
which the statute had run, but there was an implied proxise
on his part to refund the payment made on September 14,
292 samoutings of \$8,8400. The statute commanded I im
1922 samoutings of \$8,8400. The statute commanded I im
(Sec. 293 (a) of the Revenue Act of 1924, 49 Stat. 293, 30). Having agreed with plaintiff that there was an overpayment and
the statute commanding him to immediately refund it, as

The case of United States v. Kreider Co., 313 U. S. 448, is no in point, since the court held in that case that there was no account stated, because the facts negatived the allegation that there was an implied promise to pay. Here the facts apport the allegation that there was an implied promise to pay, and plaintiff having sued on this implied contract within six wars, it is entitled to recover.

Judgment will be rendered in favor of plaintiff and against the defendant for the sum of \$3,840.00, with interest as provided by law. It is so ordered.

Madden, Judge; Jones, Judge; Lettleton, Judge; and Whalet, Chief Justice, concur. STATES

THE SIGHT TRIBE OF INDIANS, CONSISTING OF THE SIGUX TRIBE OF THE ROSERUD INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA: THE SIOUX TRIBE OF THE STANDING ROCK INDIAN RESERVATION IN THE STATES OF NORTH DAKOTA AND SOUTH DAKOTA . THE SIGHT TRIBE OF THE PINE RIDGE INDIAN RESERVATION IN THE STATE OF SOUTH DA-KOTA: THE SIOUX TRIBE OF THE CHEYENNE RIVER INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE CROW CREEK INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE LOWER BRULE RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE SANTEE INDIAN RESERVATION IN THE STATE OF NEBRASKA; AND THE SIOUX TRIBE OF THE FORT PECK INDIAN RESERVATION IN THE STATE OF MONTANA v. THE UNITED

Santee Offset

[No. O-531 (12). Decided December 1, 1941]

On the Proofs

Indian delate; pôliquities under lie breise et 1861; effect aliment in persona suin-l'indiant plantitetions et el 1861; 1875 minus within this limit and others, went trought provides that all calains et aliment and other suince the suince transition of the suince determined by this Court of Claims, may be sedimitted to the determined by this Court of Claims, may be sedimitted to the effect of the court of the court of the court of the court of the whether under the terms of and at the plaintifus and entitled to recover \$1.00,000,002 beneforce paid to said judientitied to recover \$1.00,000,002 beneforce paid to said judientities of the suince the said of the said to the said of the entities of the said to the said to the said of the said to the entities of the said to the said to the said to the said to the entities of the said to the said to the said to the said to the entities of the said to the said to the said to the said to the entities of the said to the said to the said to the said and the said to the said to the said to the said to the said and the said to the said the said to the said to the said to the said th

Held:

1. The obligations of the treaty of 1968 have been complied with, and the amounts due thereunder have been paid, both in fact and in effect.

Reporter's Statement of the Case

2. The instant suit is based on the treaty of 1808, which has been fully complied with, and is not based on nonpayment of obligations of other treation.

a. Concoding that in the Medianskonton case, supro, the court did not pass upon the mourtain of the offset in question but purished the pass to the control of the control of the purished to the court of the court

The Reporter's statement of the case:

Mr. Ralph H. Case for the plaintiffs. Mosers. James S. Y. Ivins and Richard B. Barker were on the briefs. Mr. Raymond T. Nagle, with whom was Mr. Assistant At-

torney General Norman M. Littell for the defendant.

The court made special findings of fact as follows:

1. By the first two sections of an act of Congress approved

June 3, 1920 (41 Stat. 738), it was provided That all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon.

against the United States, and to enter judgment thereon.

Sec. 2. That if any claims or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwith-standing lapse of time or statutes of limitation, and any payment which may have been made upon any claims so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the

United States shall be allowed credit for all sums heretofore paid or expended for the benefit of said tribe or any band thereof. The claim or claims of the tribe or band or bands thereof may be presented separately or jointly by petition, subject, however, to amendment, suit to be filed within five years after the passage of this Act; and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant, and any band or bands of said tribe or any other tribe or band of Indians the court may deem necessary to a final determination of such suit or suits may be joined therein as the court may order. Such petition. which shall be verified by the attorney or attorneys employed by said Sioux Tribe or any bands thereof, shall set forth all the facts on which the claims for recovery are based, and said petition shall be signed by the attornev or attorneys employed, and no other verification shall be necessary. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said tribe or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney

or attorneys for said tribe or bands of Indians.

2. The real party at interest is the Santee Tribe or Band of Sioux Indians of the Santee Indian Reservation in the State of Nebraska.

3. On Sentember 29, 1837 (7 Stat. 283), a treaty was made.

by the United States with certain chiefs and bands of the Sioux Nation of Indians, purporting to have been signed by members of the Medawakanton Band alone, by the first article of which said Indians ceded to the United States all their land east of the Mississippi River and all their islands in said river.

In consideration of said cession the United States, by Article 2, agreed, among other things, to invest the sum of \$300,000.00 and to pay to said Indians the interest thereon at the rate of not less than five per centum forever.

4. By the treaty of 1851 (10 Stat. 954) plaintiff bands of Indians eeded their interest in certain lands to the United States and bound themselves to perpetual peace with the United States.

The United States, among other things, undertook to provide a trust fund of \$1,160,000.00 (later increased to \$1,229,

800.00 by Senate amendment), with interest thereon at five per centum commencing July 1, 1829, to be paid annually to plaintiff bands for a period of 50 years, the payment to be in full discharge of the trust fund and interest at the end of 50 years.

5. În August 1592 an outbreak occurred among the samulyisticum in Minesota, consisting of the plaintiffs and the Sisseon and Wahpeton Bands, during which a large number of white settlers was unsanced and a rard amount of property of the settlers of the settlers of the property of th

6. On April 29, 1868, the Sloux Indians, including the Santees, entered into a treaty of amit with the United States (18 State, 639) by which the United States agreed to supply the Indians with buildings, money, clothing, and other beneficial objects and facilities, the consideration morning from the Indians being that they were to keep the peace toward the whites and would withdraw opposition to the traction was cellular millouds and milliary posts. Former restation were clearly and registe to money, clothing, and articles of property promised in morie treaties.

By this treaty the defendant was obligated to and did expend for the benefit of the plaintiffs the sum of \$1,903,-023.22 during the period from 1870 to 1921.

7. By Special Act of Congress approved March 4, 1917 (39 Stat. 1195), entitled "An Act for the restoration of anmutities to the Medawakanton and Wahpakota (Santee) Sioux Indians, declared forfeited by the Act of February sixteenth, eighteen hundred and sixty-three," among other things, it was provided

That jurisdiction be, and hereby is, conferred upon the Court of Claims to hear, determine, and render final judgment for any balance that may be found due the Medawakanton and Wahpakoota Bands of Sioux In-

Reporter's Statement of the Case dians, otherwise known as Santee Sioux Indians, with right of appeal as in other cases, for any annuities that may be ascertained to be due to the said bands of Indians under and by virtue of the treaties between said bands and the United States, dated September twentyninth, eighteen hundred and thirty-seven (Seventh Statutes at Large, page five hundred and thirty-eight), and August fifth, eighteen hundred and fifty-one (Tenth Statutes at Large, page nine hundred and fifty-four), as if the Act of forfeiture of the annuities of said bands approved February sixteenth, eighteen hundred and sixty-three, had not been passed: Provided, That the court in rendering judgment shall ascertain and include therein the amount of accrued annuities under the treaty of September twenty-ninth, eighteen hundred and thirtyseven, up to the date of rendition of judgment, and shall determine and include the present value of the same, not including interest, and the capital sum of said annuity, which shall be in lieu of said perpetual annuity granted in said treaty; and to ascertain and set off against any amount found due under said treaties all moneys paid to said Indians or expended on their account by the Government of the United States since the treaties were abrograted by the Act of February sixteenth, eighteen hundred and sixty-three: Provided. That the treaty of April twenty-eighth, eighteen hundred and sixty-eight, shall not be a bar to recovery, but all equities and benefits received thereunder by the Santee Sioux Indians shall be taken into consideration in the determination of the amount of recovery. Upon the rendition of such judgment and in conformity therewith the Secretary of the Interior is hereby directed to ascertain and determine which of said Indians now living took part in said outbreak and to prepare a roll of the persons entitled to share in said judgment by placing thereon the names of all living members of said bands residing in the United States at the time of the passage of this Act, excluding therefrom only the names of those found to have personally participated in the outbreak; and he is directed to distribute the proceeds of such judgment, except as hereinafter provided, per capita, to the persons borne on the said roll.

8. Pursuant to such act the Indians named in Finding 7 filed suit and judgment was rendered in favor of such Indians against the defendant, after allowing offsets, in the sum of \$386,597.89 (Medawakanton Indians et al. v. United States, supra).

The court held that had the treaties of 1837 and 1851 re-

mained in effect from the dates of such treaties to the date of judgment the annuities payable under such treaties would have aggregated \$4,652,750.00. In calculating this sum the court included payment of the principal sum of \$300,000,00 set apart as an investment for plaintiff Indians under the treaty of 1837, and also allowed them interest on such principal sum from date of such treaty to the date of rendition of judgment (Finding XVII, p. 371).

The court offset \$2,353,128.89 under those provisions of the iprisdictional act which related to "moneys paid to said Indians or expended on their account by the Government of the United States since the treaties were abrogated by the Act. of February Sixteenth, Eighteen Hundred and Sixty-three." This included annuity payments, depredation claims, payments of debts, and other expenditures not connected with the treaty of 1868 (Findings III to XV, incl., summarized in Finding XVII, p. 371).

The court also deducted \$1,903,023,22 expended between 1870 and 1921 for the benefit of the Santees under the treaty of 1868 (Finding XVI, p. 371).

9. The Indians in whose behalf this suit is brought, now known as the Santee Sioux, were the parties plaintiff in the Medawakanton case. The history of the changes in name. migrations, and habitate of the bands is not material to this action but may be found in the report of the above-mentioned

 The present suit is to recover the sum of \$1.903.023.22 expended for the benefit of plaintiffs under the treaty of 1868, on the ground that as this sum was set off against obligations under previous treaties, the defendant, in effect, did not expend such sums under the treaty of 1868.

The court decided that the plaintiff was not entitled to pecover.

Joyps. Judge. delivered the opinion of the court:

The jurisdictional act under which this suit is brought is set out in the findings. It provides that all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States "which have not heretofore been

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determined by the Court of Claims, may be submitted to the Court of Claims."

Under the terms of the act several suits were filed. The basis of the present suit has been narrowed to the single question of whether under the terms of the act conferring princisition the plannitifiar are neithful to recover \$1,900,008.29 heretofore paid to them by the defendant under the treaty of 1896 (18 Sett. 465s) and subsequently charged as an offset against other claims of the plaintiffs litigated in the case of Briefly. Or the treaty of Sectionees 20, 1837 (17 Sets. 288).

Brietty, by the treaty of September 29, 1837 (7 Staf. 589), the Sioux Nation of Indians ceded certain lands to the United States and the United States agreed to invest for the benefit of such Indians the sum of \$800,000.00 and to pay them interest thereon at the rate of not less than 5 per centum forever.

By the treaty of August 5, 1881 (10 Stat. 984) the denedant, as consideration for the cession of certain lands, established an additional trust fund in the sum of \$1,100, 000.00 (increased in the Senate by amendment to \$1,229, 000.00) with interest thereon at 5 per centum, commencing July 1, 1892, to be paid annually over a period of fifty years, such fifty payments to discharge both principal and interest.

such htty payments to discharge both principal and interest.

In the year 1862 a serious outbreak occurred among the
Indians of Minnesota during which many white people were
killed and much property destroyed.

Following this outbreak, the Congress on February 18, 1986, abrogated and annulled all trestine therefore made and entered into by certain tribes of the Sioux Indians, including the ones at interest in this cause, in so far as said treaties, or any of them, purported to impose any future obligation on the United States. All lands and rights of occupancy within the State of Minnesota, and all annuiries and claims therefore accorded the said Indians, or any of them, were declared to be forfeited to the United States. It was cited as a reason for such conceilation that 'during It was clearly and the contraction of th

Quinien of the Court

children within the State of Minnesota, and destroyed and damaged a large amount of property" (12 Stat. 652).

On April 29, 1886, the Sioux Indians, including the parties at interest herein, entered into a treaty of amity with the United States (15 Stat. 635). By the terms of this treaty certain lands therein described were set apart for the tribes of the Sioux Indians and the United States agreed to furnish the Indians certain monies, clothing, and articles of property and educational facilities.

It was also stipulated by Article 17 of such treaty that it should have the effect and should be construed "as abrogating and annulling all treaties and agreements hereforce entered into between the respective parties hereto, so far as treaties and agreements obligate the United States to furnish and provide money, dothing, or other articles of property to such Indians and bands of Indians as become parties to this treaty."

By the terms of this treaty the United States expended on behalf of the Indians between the years 1870 and 1921 the sum of \$1,903,023.22.

On March 4, 1917, the Congress by special act (39 Stat. 1199), conferred jurisdiction upon the Court of Claims to hear, determine, and render final judgment for any balance found due to certain bands of Indians, parties at interest herein, for any annutties that might be ascertained to be due said bands of Indians under the treaties of 1887 and 1861 heretofore referred to

Pursuant to this act, suit was filed and the Court of Claims, after exhaustive investigation, rendered judgment for plaintiff Indians in that suit in the net sum of \$386.597.89.

The Court of Claims calculated the different sums provided for plaintiff Indians under the two treaties mentioned, and also calculated the different offsets which the defendant should be allowed for expenditures made, and arrived at the balance due the plaintiff Indians under the terms of the jurisdictional act.

Among the sums allowed to the defendant as an offset in that case was \$1,903,023.22 expended in behalf of the Indians under the treaty of 1868, supra.

<sup>\*</sup> Medowakonton Indians et al. v. United States, 57 C, Cis. 357, 271. 379.

Opinion of the Court
This sum is the controverted issue in this case.

Plaintiff contend that the expenditure of this nun was required an abliquition of the treaty of 1889; that it had no connection whatever with the obligation of the previous treaties, and that under the jurisdictional act of 1917, appre, the Court of Claims had no choice but to allow the offset, that the effect of the court's action was to reimburse the defendant for an obligation that was due and owing to the plaintiffs, and with "in effect, therefore, the defendant never expended for the contract of the contract of the contract of the treaty compelled to expend for them under the terms of the treaty of Auri 120, 1888. \* because it legally but unjust-

fiably recouped itself."

The defendant contends:

(1) That the court is without jurisdiction because, in the decision under the jurisdictional act of 1917, it already had determined the validity and legality of the offset of \$1.903.023.22:

(2) That plaintiffs' claim is barred under the doctrine of res judicata;

(3) That plaintiffs are estopped to deny the legality and validity of the offset, because they accepted the benefits of the jurisdictional act of 1917; and

(4) That, on the merits, the plaintiffs would not be entitled to recover.

The parties in interest were also the parties plaintiff in Medavadandor Indians et al. v. United States, appra. Certain changes in name and residence of the bands are not material to this section. Any interests of any of the other plaintiffs named in this suit are covered by the same principles and facts enunciated here. The Sloux Tribe of Indians, the nominal plaintiffs in this action, include the Santee Indians for whose benefit this suit is brought.

We do not think plaintiffs are entitled to recover.

It will be noted that the act of 1920 (41 Stat. 738), under which this suit is brought, confers jurisdiction to hear and determine all claims, "which have not heretofore been determined by the Court of Claims."

The defendant insists that the quoted clause leaves the court without jurisdiction by virtue of the decision in the Medana kanton case, supra, wherein the sum herein sued for was applied as a setoff against obligations under previous treaties. It cites as sustaining authority the case of Eastern or Emigrant Cherokees v. United States. 82 C. Cls. 190 (certiorar)

denied 299 U. S. 551).

Apparently recognizing the force of this contention, the plaintiffs do not sue for any unpaid balances under the treaties of 1837 or 1851, but bottom their suit on the allegation that the obligations under the treat or 1868 are "in effect"

unpaid.

We quote from plaintiffs' brief:

In the prior suit the plaintiffs' cause of action was limited to their rights under their annuity treaties of 1837 and 1831. No cause of action was given the plaintiffs as their rights under the Treaty of April 29, 1888. Thus, the present suit is not premised upon any prior claim of the plaintiffs before this Court.

Plaintiffs suit therefore is based primarily on alleged violations of the treaty of 1868, or failure to fulfill its obligations. They admit that over the period of fifty years the defendant compiled with all its terms, but insist that since that amount was applied as an offset in a suit to recover payments under previous treaties, the money was in effect not expended. This seems rather a strained construction

Full payment was actually made under the treaty of 1868. None of the money was ever returned by the plaintiffs. In the suit under the 1917 act for unpaid balances under the theretofore abrogated treaties of 1837 and 1851, the court offset or reduced the payments called for in such treaties by the amount of the payments under the treaty of 1868.

It naturally follows that the obligations of the 1868 treaty have been met. If any part of any obligations remains unpaid it is a purt of the obligations of the treaties of 1887 and 1851, which on the direct issue were reduced by a pleaded offset.

Plaintiffs insist that while the obligations of the treaty of 1868 have been paid, they have not "in effect" been paid. We almost get lost on the way. We are unable to follow this meandering type of logic.

We hold that the obligations of the treaty of 1868 have been complied with both in fact and in effect. By the terms of the jurisdictional act of 1917 the Court of Claims was authorized to go fully into the claims of the plaintiff Indians under the treatise of 1937 and 1935. as if the act of ferfeiture had not been passed, and to ascertain the amount of any unpaid obligations under such treatise; and to assertain and set off against any amount found due under said treatise all monine paid to said Indians or expended on their account by the Government of the United States, subsequent account by the Government of the United States, subsequent account by the Government of the United States, subsequent account by the Government of the United States, subsequent account by the Government of the United States, subsequent account by the Government of the United States, subsequent about the Contract of the Contract of the Contract of the above the Contract of the Contract of the Contract of the account of the Contract of the Contract of the Contract of the state of the Contract of the Contract of the Contract of the Contract of the state of the Contract of the

The court, in the Medawakanton case, interpreted the special act as conferring jurisdiction to pass upon these particular items and has rendered judgment in the matter, which is final and conclusive.<sup>3</sup>

As we read the opinion, the court decided, and we think properly so, that the act of 1917 required the offset of any payments made under the treaty of 1808. It is difficult to ascertain from the language in the brief what is the precise contention plantifis make on this point. Expressed in our own language, we construe such contention to be that deduction by the court was a new contention to the that deduction by the court was a new contention to the that deduction by the court was a new possible of calculation, and that the question of the court, it having been predetermined by the Congress which wrote the set.

If this viewpoint is accepted, and there is strength to the position, we are still face to face with the fact that this suit is based on the treaty of 1888, which has been fully complied with, and is not based on non-payment of obligations of earlier treaties.

Even conceding that the court in the Medacakanton case did not pass upon the merits of whether the offset in question should be allowed, but merely followed the mandatory direction of the Congress, thus treating the entire question as

<sup>\*</sup>Stoli v. Gottlieb, 305 U. S. 165; Lamber; v. Central Bank of Gastens, 25 Fed. (23), 954, certiorari dealed 300 U. S. 658; United States v. Colifornia & Oregon Land Co., 192 U. S. 205.

Opinion of the Court

before us anew, and considering all the equities under the jurisdictional act of 1920, we do not think that plaintiffs are legally or equitably entitled to recover.

Under the earlier treaties defendant obligated itself to pay to plaintiffs certain annuities. Following the outbreak in 1862 any further obligation under these treaties was declared to be forfeited.

Later the treaty of 1868 was entered into, under which certain expenditures were promised and paid, with the proviso that all the unpaid obligations of the previous treaties should continue to be burred.

The jurisdictional act of 1920, under which this suit was instituted, stipulated that all claims of whatsoever nature

" which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims " for determination of the amount, if any, due said tribe from the United States under any twattee, agreements, or laws of Congress, or for the missproportation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United Claims of Lands or lands

The act further provided that

\* \* \* any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums heretofore paid or expended for the benefit

of said tribe or any band thereof.
To allow the paintiffs to recover annuities under abrogated treaties and to retain without offset the benefits received under the treaty of 1888 would be inequitable. To permit the previous treaties and the treaty of 1888 which was entered into in lieu thereof, and which contained a provision that payments under previous treaties were barred, to nevertheless run concurrently, and to give full payment under all the treaties, would constitute double payment, but for the queriesing in 1882, with the consequent cancellation of the previous treaties, the provision for payment under the received payment and the contraction of the previous treaties, the provision for payment under the received payment and the contraction of the previous treaties, the provision for payment under the received payment and the contraction of the previous treaties, the provision for payment under the received payment and the provision of the previous treaties, the provision for payment under the previous treaties and the provision of the payment and the previous treaties, the provision for payment under the previous treaties and the previous treaties, the provision for payment under the previous treaties, the provision for payment under the previous treaties, the provision for payment under the previous treaties, the previous treaties and the previous treaties and the previous treaties and the previous treaties are payment and the previous treaties and the previous treaties are provised to the previous treaties and the previous treaties are provised to the previous treaties and the previous treaties are provised to the previous treaties and the previous treaties are previous treaties.

Syllabus 95 C. Cle.

vious treaties, plus full payment under the substituted treaty of 1898 covering the same period, would be equivalent to allowing a man to take advantage of his own wrong. Neither the history of the treaties nor the language of the act of 1920 justifies such an interpretation.

As shown by the special acts, Congress evidently desired that the plaintiffs should have the benefit of the treaties that promised the larger benefits, but not both these and the treaty of 1868 at the same time.

A generous Congress has restored the benefits of treaties that had been annulled, and provided in the act of restoration that the United States should be allowed credit for all sums paid or expended for the benefit of the plaintiff tribe. It is equitable that the payments made under the treaty of 1868 in lieu of the forfeited annuities should be recognized as a just offset in the general accounting.

It follows that plaintiffs' petition must be dismissed, and it is so ordered.

Madden, Judge; Whitaker, Judge; Littleton, Judge; and Whalet, Chief Justice, concur.

FRED J. RICE AND W. CAMERON BURTON, RE-CEIVERS FOR D. C. ENGINEERING COMPANY, INC., v. THE UNITED STATES

[No. 43209. Decided December 1, 19411\*

On the Proofs

Goormont custract; scores out due to datay; responsibility of defendant—induced the facts disclored by the record, the provisions of plaintiffs contract, the representations of the obtaincent of the provision of the provision of the contract eral custraction work should be performed, and the statements and representations in the specifications and drawings relating to all work upon the entire project, upon all of whele plaintiff to all work upon the entire project, upon all of whele plaintiff and installing plumbing, heating and ventilating equipment at the Veterna's Administration for position of the provision of Makine; it is add that plaintiff as entitled to recover \$30,000. It Makine; it is add that plaintiff as entitled to recover \$30,000. It delay due to defendant.

<sup>\*</sup>Certiovari granted April 13, 1942.

## Reporter's Statement of the Case

Some.—Then was an esseese of plaintiffs contract with defendant, and nowhere in the contract or specifications for the work covered by said contract nor in defendants' contract and specifications for construction of the building in which plaintiff was to perform its work was the defendant referred of responsibility for a liability or plaintiff for cense contain pramato and the second proposal contract of the se

Same; unforcesor conditions.—The fact that a condition seconstruct, which causes delay, is unforcessed on unanticipated does not render the delay unanvoidable and is not enough to relieve the occurracing party, whose contractual day; it is to overcome it, from responsibility for damages to the other party from the States, 40 C. ch. e80, affirmed 240 U. S. 150, cited.

#### The Reporter's statement of the case:

Mr. R. Aubrey Bogley for the plaintiffs. Mesers. Mc-Kenney, Flannery & Craighill were on the brief.

Mr. Elihu Schott, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant. Mr. Rawlings Ragland was on the brief.

Plaintiffs, as receivers, seek to recover \$26,044.64 repreenting the total loss sustained by the D. C. Engineering Company under its contract with defendant for furnishing and installing plumbing, heating, and ventilating equipment at the Veteran's Administration Hospital Building constructed by the defendant under a separate contract at Torus, Maine.

The theory upon which plaintiffs seek to recover the monunt stated is that defendant had agreed and was obligated to prepare the site and to construct the building in which the D. C. Engineering Company was to perform the property of the commencement of construction operations in the spring of commencement of construction operations in the spring of the work to be performed therein by the D. C. Engineering Company until October 8, 1892, or 196 days after plaintiff delayed for an additional period of 48 days at the end of the construction program, which required a total of Especiary Statement of the Care
510 days, or 260 days in excess of the originally fixed
period, the defendant is liable under its contract with the
D. C. Engineering Company for the total excess cost of
\$82,044.64 sileged to have been caused by this delay.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

 Plaintiffs are the receivers of the D. C. Engineering Co., Inc., a District of Columbia corporation, having been duly so appointed by the Supreme Court of the District of Columbia February 7, 1984, and by that court authorized to institute and prosecute this suit.

Prior to March 12, 1932, the Government, through the Veterans' Administration, decided to construct a large Veterans' Hospital at Togus, Maine, known as Veterans' Administration Home, and to do all work necessary to complete the project by separate contracts for (1) general construction; (2) plumbing, heating, and electrical work; (3) electric elevators; and (4) a refrigerating plant. Accordingly, detailed specifications and drawings were prepared by the Government through the Veterans' Administration construction service for the four classes of work mentioned. The specifications for the entire project were in one volume. The general conditions set forth in the specifications were applicable to each contract to be entered into between the Government and the successful bidder for each classification of work, the single standard form of contract to be separately executed by each successful bidder for the classification of work covered by his bid, and the detailed specifications applicable thereto, The plans and drawings for the entire work to be performed by all the contracts with the Government either accompanied the specifications or were made available to all bidders. The standard form of contract subsequently entered into between the Government and each successful bidder contained at the time of execution only such additions as were necessary to describe the nature of the work to be performed thereunder and the contract price therefor,

March 12, 1982, an invitation for bids was prepared and issued in a single document for the four classifications of work, a copy of which, together with all the specificaReporter's Statement of the Case

tions for the entire project, was furnished to prospective bidders. This invitation for bids, so far as pertinent here, was as follows:

Sealed side, in triplicate, subject to the conditions contained herein, will be received by the Veterans Administration April 19, 1932, and then publicly opened for furnishing all labor and materials and performing all work required for constructing and finishing complete at Veterans Administration Home, Togus, MAINE, Hospital Building. This work will include excavating, roads, walks and drainage, reinforced concrete, hollow tile, brickwork, cut stone, architectural terra cotta, slate stair treads, marble work, terrazzo floor and wall tile, rubber tile, compressed asphalt tile and lineoleum floors, iron work, steel sash, steel stairs, steel shelving, cabinets and partitions, metal and built-up rooting, roof ventilators, skylights, lightning conductors, metal lathing, plastering, sound deadening, carpentry, metal weatherstrips, insect screens, linen chute, platform scales, painting, glazing, hardware, plumbing, refrigerating, heating and ventilating, electrical work, electric elevators, and outside distribution systems, and such other items as shown or specified. Separate bids will be received for (a) General Construction; (b) Plumbing, Heating, and Electrical Work; (c) Electric Elevators; and (d) Refrigerating Plant; all as set forth on hid form.

Bids must be submitted upon the Standard Government Form of Bid and the successful bidder will be required to execute the Standard Government Form of Contract for Construction.

Time of performance will be an essence of the conract and bink will be evaluated on the basis of time. In evaluating bink there will be added to each bid other in the contract of the contract of the contract of the an amount equal to the shilly implicated damages named in the Invitation for Bids, multiplied by the number of calendar days that such bidders have named for performance of the work in excess of the days named by the contract of the work in the abovestime.

The invitation for bids, as well as paragraph 37 of the specifications and art. 9 of the standard contract form, provided that liquidated damages for delay by failure of the Beperter's Statement of the Case contractor to complete the work included in his bid within the time specified would be at the rate of \$130 a day for

the time specified would be at the rate of \$130 a day for "general construction"; \$70 a day for "plumbing, heating, and electrical work"; \$10 a day for "electric elevators"; and \$10 a day for "a refrigerating plant".

As a part of the invitation for bids the Government, in writing, advised all prospective bidders that it was the general intention that the contractor for general construction would, unless otherwise specified, completely prepare the site for building operations and furnish all labor and materials required to construct and finish complete as shown on the drawings, as described by the specifications, and as noted in his bid, upon which an award might be made, the one hospital building, and roads, walks, grading and drainage, etc., and that the mechanical equipment covered by contracts made upon awards therefor under separate bids would be installed in the building as its construction progressed. as called for in the construction contract and specifications. Par. 7 of the specifications and art. 13 of the contracts provided that each contractor should fully cooperate with other contractors and carefully fit his own work to that provided under other contracts as might be directed by the contracting officer, and that no contractor should commit or permit any act which would interfere with the performance of work by any other contractor.

The hidder for general construction work of seeking the hospital hullifling was required by the invitation for bids and the specifications to state the times within which sease work would be completed, and time of performance was to be an ensure of the contract between the Government and the contractor for general construction for sepafractions relating to plannling, heating, electrical work, and factors relating to plannling, heating, electrical work, and see forth thereis would provide that the specard conditions in connection with plannling, heating, and other mechanical work, and further provided as follows:

TIME FOR COMPLETION: All work under this section [plumbing, heating, etc.] of the specification shall be completed at a date not later than that provided for in the contract for General Construction (see construction)

Reporter's Statement of the Case

tion section of specification and bid forms for the completion of work under that contract.) Failure to comply with the above will result in the deduction of

compry with the above will result in the deduction of liquidated damages from contract payments as here-inbefore provided under "General Conditions".

mostore provioce unner "senseral Constituent".

2. Chas. Smith & Sons, Inc., of Hartford, Com., was the successful bidder for the work of constructing and finishing complete the hospital bidding, together with all roads, walks, grading and drainage in connection therewith. On the contract of the contraction of the contraction of the contraction, the contraction of the contraction, the contraction of the contract provided that "The work of the contraction of the con

date of receipt of notice to proceed and shall be completed within two hundred and fifty (250) calendar days after

due to rescript of notice to process?

On or shortly before April 19, 1983, the sites specified in the invitation for bids issued March 12, 1983, the 16 Legalization of the control of the process of the control of th

milds with the understanding that all work covered thereby milds that the contract for General Construction. Plaintiffs blid was accepted by the Government and, on April 29, 1932, the plaintiff and the United States, represented by L. H. Tripp, Director of Construction, Veteran's Administration, as contracting officer, excepted the standard form of contract, received the state of the contract of the contract of the performed thereunder, was, in all respects, identical with the 95 C. Cls.

Reporter's Statement of the Case
contract between the Government and the contractor for the

work of constructing the building.

3. May 9, 1932, the Government through its contracting officer gave Chas. Smith & Sons, Inc., the contractor for general construction, notice to proceed, and on May 12 gave plaintiff written notice to proceed as follows:

You are hereby notified to proosed with the installation of Plumbing, Heating, and Electrical Work at Veterans' Administration Hospital, Togus, Maine, sometimplated by Contract VAc-196, dated April 29, 1932, your copy of which is attached. The performance bond signed by you and the Globe Indemnity Company, 150 William Street, New York City, N. Y., in file with the Service record of for this parcement.

It will be noted that the contract provides for completion of the work at a date not later than that provided for in the contract for General Construction. The General Construction work is due for completion within 250 Calendar Days after May 9, 1982.

Under these notices to proceed, the work of constructing the building and the work of trunishing and installing therein the plumbing, heating, and electrical equipment were does not completion January 14, 1983. The progress of plaintiff's work under its contract was dependent upon progress of the general construction work being performed by the Government under a separate contract.

the doverminent under a sejarate contract.

In the contract of the importance of the importance of the importance of the importance of the index of the importance of the index of the importance under its contract if it was the successful bidder, conferred with the Director of Construction of the Veteran's Administration, who was the Government's contracting officer, to determine when the work of constructing the hospital build-which it would be presented. The contracting officer at vincel planning that construction work would commence in early spring of 1892 as soon as weather conditions would permit to that the building would be under roof and enclosed before old weather set in during the following closed before old weather set in during the following and upon the basis of the provisions of the setandard form

Reporter's Statement of the Case
of contract and the specifications. Plaintiff was ready to
proceed and perform the work called for by its contract at
all times on and after the date on which it received notice

to proceed. Plaintiff's contract provided in art, 1 that "The work shall he commenced promptly after date of receipt of notice to proceed and shall be completed at a date not later than that provided for in the contract for general construction." Art. 3 of plaintiff's contract and, also, of the contract between defendant and Chas. Smith & Sons. Inc., for general construction provided that the contracting officer might at any time by written order make changes in the drawings and specifications of the contract, or in either, and within the general scope therof, and that if such changes caused an increase or decrease in the amount due under the contract, or in the time required for its performance, an "equitable adjustment shall be made and the contract shall be modified in writing accordingly:" that any claim for adjustment must be asserted within ten days from the date the change is ordered, unless the contracting officer should extend the time, and that if the parties could not agree upon the adjust-

the work so changed.

Art. 4 of both contracts provided that should the Government discover, during progress of the work, subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the contracting offers should promptly investigate the conditions and if he found that they materially differed from those shown on the drawings or indicated in the specifications in the drawings and appelications as he might find meressary.

"and any hierease of creeness of contracts," and provided in Article 8 of this contract."

ment the dispute should be determined as provided in art. 15 of the contract; but that nothing in that article should excuse the contractor from proceeding with prosecution of

Art. 15 provided that all disputes concerning questions of fact arising under the contract should be decided by the contracting officer or his authorized representative, sub-

ject to appeal by the contractor within thirty days to the head of the department, whose decision should be final and conclusive upon the parties thereto as to such questions of fact, and that, in the meantime, the contractor should diligently proceed with the work as directed.

The defendant's specifications relating to excavation and foundation work in connection with construction of the building within which plaintiff was to install the mechanical equipment called for by its contract, and which specifications were furnished to plaintiff when hids were called for, provided (1 C-1, par. 2) that the contractor for general construction would clear the site of the building "and do all necessary excavating to the dimensions and levels shown on drawings for basements, areas, foundations, footings, walls, floors, and all work shown;" that should rock, within the definition of the specifications, be encountered within the limits of the required excavations payment for removal thereof would be made subject to such adjustment as provided by articles 3 and 4 of the contract; that only solid ledge rock or rock that could not be removed with pick or wedge, or boulders exceeding 12 cubic feet in bulk, should be considered as rock: that the bottom of all excavations for foundations should be properly leveled off and footings placed on undisturbed soil: that excavations should not be

Exvava to lodge for all piers, columns, footings, foundations, etc. The approximate location of ledge is shown on drawings. All supporting members, piers, walls, etc., must read a solid role lodge. The leaction of ledge shown on drawings is approximate, but as a reading the shown on drawings is approximate, but as reader will remove all materials to ledge where required for all walls, piers, etc., under this contract but any ledge necessary to remove will be adjusted according to the contract. All bearing masoury hall rest will be sermitted, see. No sloping or rough rock beds will be sermitted.

carried lower than required for footings, foundations, etc., as shown on the drawings; that work of excavating to the dimensions as shown on the drawings as required by the nature of the soil, or for additional construction, would be paid for as an extra in accordance with the contract. This specification further provided as follows:

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5. The defendant through its contractor for general construction started construction work immediately after May 9. 1982, and sometime prior to June 4, 1982, plaintiff received notice from defendant's general contractor that sufficient progress on the general construction work would be made by June 6, 1932, to enable plaintiff to commence and thereafter prosecute its work. Upon receipt of this notice plaintiff proceeded to employ its superintendent and prior to June 4 it shipped to the site of the work \$2,500 worth of tools and equipment and several carloads of plumbing, heating, and electrical material to be installed in the building under its contract. On June 6 plaintiff's president and its superintendent arrived at the site of the work to begin operations. and, upon arrival, plaintiff found that 80 percent of the work of excavating for foundations of building had been done, but that, on that date, all work by the general contractor had been stopped by the defendant due to the encountering of subsurface conditions materially differing from those shown on the drawings and set forth in the specifications. The defendant through its contractor for general construction had commenced excavation work May 11, but before June 6 changed conditions were encountered and the defendant discovered that the foundations for the building could not be constructed as shown on the drawings and as set forth in the specifications because of the fact that, over a large portion of the foundation area, instead of finding proper foundation bearings, as shown on the drawings and as stated in the specifications, soft sand, and a great deal of water and quicksand were encountered. Thereupon the contracting officer ordered all construction work stopped pending decision as to what should be done. All general construction work in connection with foundations for the building remained under suspension by order of the contracting officer from about June 4 until August 9, 1982. In the meantime, the defendant at its own expense carried on exploration work in connection with which numerous test nits were dug to much greater depths and dimensions than originally called for and numerous bearing tests were made therein for the purpose of ascertaining whether adequate foundation support could be secured on the original 440978-42-CC-vol. 95-8

Reporter's Statement of the Case site and for the purpose of securing the information necessary for preparation of new drawings to meet and overcome the conditions encountered in connection with the foundations of the building. A number of conferences were held and it was finally decided that because of the subsurface conditions, which had not been anticipated by anyone, the building could not be constructed within the lines of the original site and that its location would have to be changed so as to avoid the conditions encountered and prevent the large increase in costs of construction which would otherwise be necessary. Following the test excavations and the conferences, the contracting officer moved the location of practically the entire building. New plans and drawings were prepared and excavation for foundations of the building on the new location was commenced August 9, 1932,

Following the making of new plans and the relocation of the hospital building, the contracting offeer insued certain of the hospital building, the contracting offeer insued certain of the property of the pr

6. During the period from June 6 to August 6, 1929, while person't contraction own't was under supersion, plaintiff and the defendant's general contractor conferred with the contracting officer and other officials of the defendant. As a result of these conferences the contracting officer exceeds the contracting officer decided that work under the changed plans and at the new location should proceed forthwith regardless of approaching the contracting officer. As officers plaintiff proceeds to the contracting officer and the contracting officers of the contracting of the

Reporter's Statement of the Case countered, different from conditions of performance as contemplated by its contract, and insisted that an equitable adjustment be made by the contracting officer under articles 4 and 3 of its contract increasing its contract price so as to meet the increased cost due to delay and the new conditions under which the work would have to be performed, i, e, during winter weather of 1932-1933 when the building would not be under cover and enclosed. But the contracting officer held and advised plaintiff that as no actual construction work had been performed by it under its contract up to that time no adjustment in the contract price by way of extra allowances could be awarded and that plaintiff would either have to give up its contract and forfeit its bond or complete the work as called for under its contract as the building was made ready therefor, and make claim in the United States Court of Claims for any excess costs incurred. 7, By October 8, 1932, the defendant through the con-

tractor for general construction had completed the foundation footings and, on that date, directed its general contractor to commence pouring concrete for the building structure. On that date plaintiff for the first time was able to commence work under its contract. For a time thereafter the only work which plaintiff could perform was that of locating and placing pipe sleeves and outlets. The work of actually installing the plumbing and heating equipment followed later, when building construction had sufficiently progressed for that purpose. The hospital building under construction except for the delay from June 4 to October 8, 1982, for which plaintiff was in no wise responsible, would have been under roof and generally enclosed before the beginning of cold and winter weather in 1932-1933. Seventy-five percent of the work to be performed by plaintiff under its contract was such as could be done along with the early general construction work as contemplated by the contract, before the building was under roof and generally enclosed. This work therefore could have been completed prior to winter weather had there been no delay in the work of constructing the building. The months of October and November 1932 were cold with some freezing weather, par-

Reporter's Statement of the Case ticularly in the latter month, and there was practically continuous freezing and sub-freezing weather during December 1932 and the months of January, February, March and early April 1933. The efficiency of plaintiff's mechanics and laborers engaged in plumbing and heating work was reduced 50 percent by reason of having to perform the work in freezing and near-freezing weather in the cold and winter months rather than in the summer and fall months as originally contemplated by plaintiff's contract, which would have been the case had the delay above-mentioned not occurred. The lowered efficiency of plaintiff's workmen, due to the changed conditions under which it was necessary to perform the work, resulted in additional labor costs to plaintiff of \$5,192.49. The salary of plaintiff's superintendent on the job during the period of delay prior to October 8. 1932, of 126 days, was \$1,170. During this period it was necessary for plaintiff to have his superintendent at the site of the work. During this delay period of 126 days plaintiff's actual overhead expense, exclusive of profit and the salary of its superintendent, was \$2,987.46. The total of extra costs mentioned is \$9.349.95.

and the plumbing, heating, and electrical work called for planiaffs contract to be installed therein were completed and accepted by the defendant October 1, 1833. This represented a delay of 48 days from August 14, 1933, the date to which the contracting officer had previously extended to original period of 250 days for completion, due to the changed conditions as hereinhefore mentioned. During this period of 45 days, plantiff is expense for wages of its superintendent and foremen, in excess of the amount of such wages over a 250 aby period, and for overhead was \$50,073.08.

8. The general construction work on the bosnital building

As to this delay in completion of the contract for general construction and plantiff contract, the defendant/ contracting officer held upon substantial eridence before him that both the general contractor and the plantiff had contributed thereto and found as a fact, among others, that delay of the general contractor was caused by plantiff in the performance of the plumbing, heating, and electrical work under its contract with the Government and that the Opinion of the Court

delay of plaintiff was caused by the general construction work which was being performed by the defendant under the general construction contract—thus constituting a delay due to unforeseeable causes beyond the control and without the fault or negligence of either contractor. In other words, the contracting officer found that each of the contractors had delayed the other during this 48-day period and he did not undertake to apportion the delay between them. His decision in this regard was not arbitrary or grossly erroneous. The contracting officer's final decision as to the delay to the contractor for general construction was made October 18, 1933, and his decision as to the delay to plain-

tiff was made on October 21, 1933, 9. As a result of the changed location of the hospital building, the contracting officer from time to time during performance of plaintiff's contract issued various orders for changes or extras under articles 3 and 5 of plaintiff's contract, the total of which resulted in a net reduction of \$1,121,18 in plaintiff's contract price from \$80,500 to \$88,-\$78.89. Certain minor defects which developed during the guarantee period under plaintiff's contract were corrected by the contracting officer at an expense of \$559.64 further reducing plaintiff's original contract price to \$87.819.18. Plaintiff was paid and has received from the defendant the last-mentioned amount of \$87,819,18.

10. The actual cost to plaintiff of performing its contract, including overhead, plus profit at the rate of 8.5 percent on the original estimated cost of performing the plumbing, heating, and electrical work was \$114,423,46, which is \$26,-044.64 in excess of the amended contract price of \$88,378.82.

The court decided that the plaintiff was entitled to recover.

LITTLETON, Judge, delivered the opinion of the court:

The D. C. Engineering Co., Inc., herein referred to as plaintiff, seeks to recover \$26,044.64, representing its total excess cost of performance of work called for by its contract over the amended contract price of \$88,378.82.

Plaintiff takes the position, in substance, that the whole of this excess cost resulted from and was attributable to an initial delay of 212 days and a subsequent additional delay of 48 days in defendant's general construction operations: that the 196 days' delay of the initial delay of 212 days was the result of failure of the defendant to have the general construction work ready for plaintiff's work within a reasonable time after receipt by plaintiff of notice to proceed, and that the 48 days' delay at the end of the contract, beyond the original fixed period of 250 days as extended to August 14, 1933, was likewise due to failure of defendant to have the construction work sufficiently advanced to enable plaintiff to complete its work that much earlier and at less cost. The building constructed by defendant under a separate contract was completed 260 days late. Plaintiff therefore contends that this delay of the defendant made it impossible for plaintiff to proceed properly and satisfactorily so as to complete its work in the period and under the circumstances contemplated by its contract; that the delay was unreasonable in that it required plaintiff to perform its work under unanticipated conditions and circumstances which rendered the work more expensive than it otherwise would have been had it been performed as contemplated by both parties to the contract, and that the defendant is liable for the total extra cost of performance.

Plaintiff relies chiefly upon the opinion of this court in M. H. McCloskey, Jr., Inc. to the Use of U. S. Fidelity and Guaranty Co. v. United States, 66 C. Cls. 105, but the principle there applied upon the facts disclosed by the record is not altogether applicable here. In that case the facts showed that the Government simply failed to fulfill within a reasonable time its contract obligation to prepare and furnish the McCloskey Company the site upon which it was to perform the work called for by its contract. We do not find that case to be authority for allowance of the full amount of the loss claimed in this case. The amount, if any, recoverable in each case depends upon proof as to the nature and extent of and responsibility for the delay or conditions giving rise to excess performance costs, and the amount of such costs as are attributable to such delay or conditions under which it became necessary for the work to be performed.

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Oninian of the Court Under the facts disclosed by the record in this case, the provisions of plaintiff's contract, the representations of the contracting officer as to the period during which the general construction work would be performed, and the statements and representations in the specifications and drawings relating to all work upon the entire project, upon all of which plaintiff had a right to rely and did rely in making its bid, we are of opinion that plaintiff is entitled to recover \$9,349.95 of the total excess cost of \$26,044.64 incurred. United States v. Smith, 94 U. S. 214, 217; Mueller v. United States, 113 U. S. 153, 156; Dermott v. Jones, 23 How, 220, 231, 233; O'Brien v. Miller, 168 U. S. 287, 297; Green County, Kv. v. Ovinlan, 211 U. S. 582, 594; American Surety Co. v. Pauly (No. 1), 170 U. S. 133, 144; United States v. Spearin, 248 U. S. 132; Wood v. Fort Wayne, 119 U. S. 312, 321, 322; H. E. Crook Co., Inc., v. United States (B-195), 59 C. Cls.

892 Time was an essence of plaintiff's contract with the defendant and nowhere in plaintiff's contract or specifications or in defendant's contract and specifications for construction of the building in which plaintiff was to perform its work was the defendant relieved of responsibility for or liability to plaintiff for excess costs by reason of delay for which plaintiff was in no way responsible. Par. 1 of plaintiff's specifications 1H-1 specifically directed plaintiff's attention to the specifications and bid form for construction of the building in which the mechanical equipment was to be installed. While it is true that in the invitation for bids and the specifications for plumbing, heating, and electrical work it was stated by defendant that this work would be required to be commenced promptly after date of receipt of notice to proceed and be completed at a date not later than that fixed by the defendant in the contract which was to be made for construction of the hospital building, the representations made were definite enough to fix the rights and liabilities of plaintiff and defendant in the event of a material deviation or change in the represented conditions or the period of performance giving rise to an increase or decrease in cost of performance. The period in which construction of the building would be commenced and completed was definitely fixed by the defendant on April 21, 1932, and plaintiff's

contract making that period of 250 days the period within which the plumbing, heating, and electrical work should be completed was executed April 29, 1932. On May 12, 1932, the defendant gave plaintiff written notice to proceed stating that it would be required to complete the work called for by its contract at a date not later than 250 calendar days after May 9, 1932, or by January 14, 1933. Before making its bid for furnishing and installing the plumbing, heating, and electrical equipment in the building to be constructed by defendant, plaintiff was advised by the contracting officer for the defendant, who had charge of all work connected with the entire project, that the work of constructing the building in which this equipment was to be installed would commence in the early spring of 1932 as soon as weather conditions permitted so that the building would be under roof and enclosed before cold weather set in during the following months. Nowhere in the invitation for bids, the specifications, or the standard form of contract, upon all of which, together with the representation of the defendant's authorized contracting officer, the plaintiff made its bid, is there to be found any provision, express or implied, that the Government was not to be responsible for or liable to plaintiff for excess cost or damage resulting from and attributable to delay in the work to be performed by defendant of constructing the building. For this reason the cases of Wood et al v. United States, 258 U. S. 190: H. E. Crook Co., Inc. v. United States, 270 U. S. 4; G & H Heating Co. v. United States, 63 C. Cls. 164: Gertner v. United States. 76 C. Cls. 643, all of which involved materially different facts, circumstances, and contract provisions, are not in point here. See Cotton et al v. United States, 38 C. Cls. 536, 548; Hude v. United States, 38 C. Cls. 649; Miller v. United States, 49 C. Cls. 276, 282, 283; Edge Moor Iron Co. v. United States, 61 C. Cls. 392, 396; Carroll et al v. United States 76 C Cls 108

Plaintiff's contract and specifications did not contain a provision that the price set forth in the contract should cover all expenses of every nature connected with the work to be done and that the Government was to be relieved

Opinion of the Court of any liability if the building structure was not furnished as contemplated and stated, so that plaintiff could proceed with and perform its work during the time and under the conditions contemplated by both parties without incurring excess costs by reason of delay in construction operations. And we think it may not be said in this case that the parties to the contract here involved understood that the Government was to be relieved of all responsibility for any excess costs by reason of plaintiff having to perform the work called for by its contract under circumstances and conditions differing materially from those contemplated therein. Globe Refining Company v. Landa Cotton Oil Company. 190 U. S. 540, 543. The fact that a condition encountered, which causes delay, is unforeseen or unanticipated does not render the delay unavoidable and is not enough to relieve the contracting party, whose contractual duty it is to overcome it, from responsibility for damages to the other party from the delay caused by such condition. Carnegie Steel Co. v. United States, 49 C. Cls. 403, affirmed 240 U. S. 156. We are of opinion that plaintiff's contract and specifications as a whole, and particularly articles 4 and 13, when considered in connection with the Government's statements and representations set forth in the specifications relating to construction of the hospital building, require the conclusion that the Government was not relieved of responsibility for such of plaintiff's excess costs as did not result from a cause for which plaintiff was responsible and which plaintiff was not required, in making its bid, to take into consideration,

In the specifications and drawings supplied to all bidders, the Government showed and indicated the conditions under which the work with which all parties were directly or indirectly concerned would be performed. In these specifications and drawings and in art. 4 of the standard form of contract the Government, in effect, represented to all bidders, including plaintiff, that in making their bids they should not take into consideration costs or expense of performance by reason of delay or extra work which might result from discovery by the Government of subsurface or latent conditions at the site of the work materially differing from those shown on the drawings or indicated in the specifi-

Opinion of the Court cations; and that if such changed conditions should be encountered, the Government, through its contracting officer, would make an equitable adjustment in the amount due under the contract and in the time required for its performance so as to take care of any increase or decrease in the cost of performance resulting from such changed conditions. We think, in the circumstances, the fact that the Government encountered and discovered conditions materially differing from those contemplated and shown in its drawings and specifications in connection with its work of constructing the building in which plaintiff was to perform its work did not relieve the defendant of the duty, under plaintiff's contract, of making an equitable adjustment so as to increase the amount due under plaintiff's contract to take care of plaintiff's increased cost of performance resulting from and attributable to such changed conditions. Plaintiff had been notified prior to June 4, 1932, that the construction work would be ready for plaintiff to begin its work by that date. Plaintiff immediately shipped all its tools and several carloads of material to the site, and employed a superintendent and sent him to the job. The contracting officer ordered the construction work stopped for a period of sixty-five (65) days, and finally moved the location of the building. This delayed the construction of the foundations five months and twentyfour days. During this time plaintiff could do no work, although it had to keep its superintendent on the job and its overhead expense was accruing. Plaintiff timely protested to the contracting officer that it should not be required to proceed with the work called for by its contract at the price stated therein by reason of the delay and under the circumstances and condition which had arisen, and insisted that the contracting officer should make an equitable adjustment increasing the amount otherwise due under its contract so as to meet the new and changed conditions which had been and would be encountered in its performance. The contracting officer, while not denying the claimed effect upon plaintiff's performance, refused to make any adjustment and, in so refusing, we think he failed to perform the duty required of him under art, 4 of the contract. It should be noted here that the contracting officer did make an adjustment in plaintiff's contract in favor of the Government of a net decrease of \$1.121 in the amount due under plaintiff's contract by reason of the elimination of certain work because of the changed conditions encountered which necessitated the relocation of the building. It seems obvious that the adjustment, in order to be equitable as contemplated in the contract, should have taken into consideration as well the then known and clearly contemplated increased performance costs of plaintiff by reason of the same conditions. The changed conditions affected plaintiff's performance and costs in much the same way as they affected the performance and costs of the defendant's construction contractor, but in a lesser degree. Nevertheless, the plaintiff got nothing for its increased costs and the construction contractor was given an increase of \$68,360.57 as an equitable adjustment "for extra work and delay" due to the changed conditions encountered.

In these circumstances and for the reasons hereinbefore stated, it becomes the duty of the court to determine and allow plaintiff the amount which will compensate it for the excess costs incurred and paid by it by reason of delay in performance of the work under conditions which rendered it more expensive than it otherwise would have been. We have found from the evidence submitted that this excess cost is \$9,349.95, made up of superintendent's salary and agreed overhead expense from June 4, 1932, the date on which plaintiff had been notified it could begin its work. to October 8, 1932, the date on which the building construction work was first ready for commencement by plaintiff of its work, and increased labor costs resulting from inefficiency of laborers who had to perform their work in the open, during the cold and winter weather of 1982-1933, rather than in an enclosed building as originally contemplated by the parties to the contract,

With reference to the further excess costs amounting to \$3,073.08, representing wages of the superintendent and foremen, and overhead expense for the delay period of 48 days after the extended date of August 14, 1933, for completion. the evidence shows and the defendant's contracting officer found that plaintiff was as much responsible for this delay as was the defendant's contractor for the general construction and, therefore, extended the time for each of the contractors from August 14 to October 1, 1933. Plaintiff is therefore not entitled to recover this cost.

The balance of \$13,621.61 of the total loss of \$26,044.64 sustained by plaintiff under its contract appears from the evidence of record to have been the result of inadequate estimates by plaintiff for costs of direct labor and materials for heating and plumbing and its inability, due to its financial condition, to take advantage of certain discounts for prompt payments on materials purchased and installed in the building. We need not determine whether under all the circumstances the plaintiff would be entitled to recover on account of loss of discounts for the reason that the proof does not show the exact amount which plaintiff was required to pay for materials, by reason of its inability to take advantage of allowable discounts through prompt payments for materials purchased. In these circumstances, this portion of the total excess cost of \$26,044.64 is clearly not recoverable.

Judgment will be entered in favor of plaintiff for \$9,349.95. It is so ordered.

GREEN, Judge, concurring:

I concur in the opinion of Judge Littleton but wish to add some observations on the case.

The defense of the defendant as set forth in its brief seems to be based largely upon the fact that the construction of the building itself was let by the defendant to amtor responsible for any delays in its erection. I think the opinion of Judge Litzbeton shows very clearly that this is no defense under the eiccumstance of the case and that the authorities cited by defendant's counsel are not applicable every go farther than this.

As the stoppage of the work was caused by the orders of the defendant's authorized agent, the construction officer, the defendant was directly responsible for the stoppage and the consequences which followed from it. Plaintiff's contract with defendant fixed a time for the completion of the building and the work of plaintiff. After the contract had CREATER DIVISION TAKES GEN.

Does entered into, the defendant, through its construction offices, by written notice, called plantiff's "attention to this requirement. The time for completion was one of the specific control of the property of the property

It makes no difference, however, in the amount of plaintiff's recovery whether the defendant be held liable directly for the stoppage, or be held liable under Articles 3 and 4 of the contract. Plaintiff's contract provided in substance in Article 3

that the contracting officer might make changes in the drawings and specifications of the contract within the general scope thereof, and also provided in substance in Article 4 that if the Government discovered in the progress of the work subsurface conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the contracting officer could make such changes in the drawings and specifications as he might find necessary. But if it should be held that these provisions authorized the change in the contract which the contracting officer made, they do not relieve the defendant of responsibility. for the same articles also provided in substance that in the event the contracting officer should make a change in accordance therewith which increased the cost of the work or the time of its performance, that an equitable adjustment should be made with the contractor. The contracting officer did make an equitable adjustment with the building construction contractor increasing the price for building construction work in the amount of \$68,360.50 for extra work and delay, but refused to make any adjustment with the plaintiff for increased costs notwithstanding plaintiff's

<sup>&</sup>quot;The word "plaintiff" is used in this opinion as referring to either plaintiffs' preferessor or the nominal plaintiffs in the case.

objections and protest against his action and stated in substance that no adjustment could be made under the contract as no actual construction work had been performed by the plaintiff at the time the change was made. This decision was cronocous. If either Articles 3 or 4 are applicable under the facts in the case, the refusal of the contracting officer to make an adjustment was a violation of the contracting officer to make an adjustment was a violation of the contracting officer to make an adjustment was a violation of the property of the contracting officer to the contraction of the contracti

It has been urged as a defense to plaintiffs action that the change made was not the fault of anyone but simply resulted from unforeseen conditions. I am of the opinion that the fact that the change made was necessary and that the cause thereof was unforseen is no defense even if it should be held that it was not the fault of anyone that the defects in the site were not discovered sarlier. See United States v. Thomas, 13 Wall, 387, 389, 384.

In my view, the defendant breached the contract in changing it to the injury and damage of plaintif at a time when plaintiff was ready to perform it and would, if permitted, have completed it in accordance with the terms to which the parties had agreed. This is sufficient to entitle the plaintiff to recover.

Whaley, Chief Justice: I concur in the part of this opinion which holds that plaintiff is entitled to actual damages resulting from the stoppage of work by order of the defendant. I do not believe Articles 3 and 4 have any application.

JONES, Judge, concurs in this statement.

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Mannex, Judge, dissenting:
I do not agree with the opinion of the Court. In my discussion I shall use the word "plaintiff" to refer either to the receivers who are here suing as such, or to the contractor who made the contract and did the work. The context will show which is meant.

Dissenting Opinion by Judge Madden
Plaintiffs' theory of recovery is stated in their reply brief
as follows:

• • Plaintiffs' claim is predicated upon a delay of 212 days caused by the Government, resulting primarily from the discovery of faulty foundations which necessitated the drawing of new plans and complete relocation of the Hospital building.

There is no claim that argone was at fault in failing to discover some the faulty foundations, but it is plaintike, position that the duky resulting therefrom, which made the position that the duky resulting therefrom, but the same the process of contract on the part, of the defrodant, mittiling plaintiffs to recover the additional cost. Ordinarily, the fact that the performance of one of the parties to a contract in made more difficult or expensive by supervening circumstances does not excuse him from performing. See 6 Willism, Contractes, see, 1985, 3, 5017, Warpland Dredging Co. v. United States, 43 C. Ch. 857. Nor does it entitle him to additional compensation. Day v. Driefel States, 430 U. S. additional compensation. Day v. Driefel States, 430 U. S.

thing in the contract here involved to take it out of the general rule. The question should be, not as the majority opinion stakes, whether under the terms of the contract "the defendant was relieved of responsibility for or liability to plaintif for excess costs by reason of delay for which plainiff was in no way exponsibile", but whether under the terms of the contract, the defendant about he hold to have assumed to the contract, the defendant about he hold to have assumed eight which was no one's fault.

Plaintiffs' claim then depends upon whether there is any-

The defendant tild not agree to have the building ready for the contractor who was to install the plumbing, heating and wring at any fixed time, and from the specification of the property of the property of the property of the performance was dependent upon the progrees of the building contractor. The specifications clearly directed its attention to the contract for general construction and advised it that is contract was to be performed in harmony with the way to be a supplied to the property of the property of the wide did the work under it was to be completed "it a disc not later than that provided for in the contract for General Construction, but there was no promise on the part of the defendant as to when that date would be. Plantiff most have known that the government reserved the power to make the power to make the power to make the carciac for that power would how the power to make that caractice of that power would howesarily cause delay. Ct. H. E. Crook Co. v. United States, 200 U. S. 4; Geriner, Sr., V. Inited States, 76. C. U. 6. 84).

Article 4 of the contract provided that if the government should discover, or the contractor encounter, unexpected conditions at the site materially differing from those shown in the drawings and specifications, the contracting officer should make the necessary changes in the plans and any necessary changes in the amount of compensation and time for performance. This provision seems to me to have reference only to the contractor whose work is directly affected by the discovery of the unexpected condition. Nor does plaintiff appear to have understood the provision in any other sense, for no reliance is placed on article 4 in its briefs. If plaintiff had made its contract under such circumstances that it and the agents of the government expected that the work would be done in the winter, plaintiff and other bidders would have estimated for a high labor cost. If, then, the building contractor had been delayed due to unforeseen conditions, so that plaintiff's work was done in the summer, it would have profited accordingly and the defendant could not, under the contract, have denied it that profit. I think this risk of gain or loss is not removed by article 4, except as to the contractor who actually encounters the unforeseen condition.

The statement of the contracting officer to plaintiff that construction would begin in early spring so that the building would be under roof before cold weather set in appears to have been a truthful statement of a reasonable expectation at the time he spoke, but hardful a promise on the part of the government that what he said would be accomplished, regardless of intervening circumstances or events.

The provision in article 9 of the contract that the contractor's right to proceed to perform the contract and to be paid without the deduction of liquidated damages for delay should not be prejudiced by delays due to "unforeseeable causes beyond the control and without the fault or negligence of the contractor" seems to show that neither party was to be charged with breach of contract merely for delays due to such causes. Plaintiff was, as it should have been, granted an extension of time and excused from liquidated damages. That was all that it was entitled to under its contract.

#### HENRY ROBERTS AGNE . THE UNITED STATES

## INo. 42475. Decided December 1, 19411

## On the Proofs

Income tax; proceeds of stock sale in cash and notes as taxable income.-Where plaintiff in 1922 owned 20 shares of the capital stock of a corporation and was the sole beneficiary of a trust, under his father's will, which owned 122 shares of said stock; and where said shares, along with the balance of the majority stock of said corporation were sold in 1922 at a price in excess of the income tax base value of said shares; and where the nurchase price of said majority stock was paid partly in cash and partly in notes, and distribution of the cash was made proportionately to plaintiff and said trust and the other majority stockholders; and where the transaction became involved in littlestion instituted by minority stockholders. such litigation resulting adversely to plaintiff and the other majority stockholders, including said trust, and where in said litigation indements were obtained against, and subsequently paid by, plaintiff and said trust; it is held that the proceeds of said sale, in cash and notes, constituted income for tax purposes in said year.

Same: sourranties and covenants in contract of sale.-Where taxnaver made returns for the year 1922 on a cash basis; and where the sale of stock made in that year was pursuant to a contract, executed in 1922, which contained warranties with respect to the financial condition of the corporation and covenant binding the seller not to engage in competition with huver, as well as certain obligations with respect to income teves of said corporation; it is held that such warranties and covenants did not keep the transaction incheate and accordingly said sale was a completed sale in 1922.

Rome: "readily realizable market value" of notes.-Where in the sale of said majority stock, for cash and notes, said cash and notes in 1922 came into the hands of the agent, or trustee, for said majority stockholders; and where only the cash was 449978-42-CC-vol. 95-9

distributed to said stockholders, including plaintiff and the trust of which plaintiff was sole beneficary; it is add that said notes had a "residity realizable market value" within the meaning of section 202 (a) (3) (c) of the Rayemae Act of 1921 and the pertinent Treasury Regulations, and constituted taxable income to plaintiff for his proportionsic share, including his proportionste share of the notes in the hands of this speech or trustee.

some years agent of describe by bilingston.—Where the right of paintiff, as well as the right of their majority scheduloire, including the trust of which plaintiff, as well as the right of those majority scheduloire, including the trust of which plaintiff was the sele benefitary, to reaks all the procede of the since of their control was at already to the process of the since of the right of the right of the scheduloire of the right of the rig

United States, 93 C. Cls. 181.

The Reporter's statement of the case:

#### ....,....

Mr. Preston B. Kavanagh for plaintiff.

Mr. J. A. Rees, with whom was Mr. Assistant Attorney General Samuel O. Clark, Jr., for the defendant. Messrs. Robert N. Anderson and Fred K. Dyar were on the brief.

The court made special findings of fact as follows upon a stipulation of the parties:

Plaintiff is, and at all times material herein was, a resident of the city of Utica, State of New York. This case involves a consideration of his income taxes for the year 1999.

2. At the beginning of the year 1925, plaintiff was the owner of twenty shares of the capital stock of the Uties Sunday Tribuns Company, a New York corporation, engaged in publishing a daily newspaper in the city of Uties, New York. At the same time plaintiff was beneficiary of a trust created by the following provisions of the will of his father, Jacob Agen, who died in 1918.

Fourth. In case my said son shall not have attained the age of 30 years at the time of my decease, then and in that event, I give, devise and bequeath all said rest, residue and remainder of my property to the trustees bereinafter named in trust to invest the same and to Reporter's Statement of the Case

keep the same invested, to collect and receive the rents, issues, and profits therefrom and to pay the rents, issues, and profits therefrom to my said son Henry Roberts Agne until he shall arrive at the age of 30 years; said rest, residue and remainder with its accumulation of interest, if any, shall become the absolute property of my said son when he shall have attained the age of 30 years.

The trustees of this trust were Amelia Agra, plaintiffs and and, and John C. Pulmer, plaintiffs uncel by marriage. Among the trust assets were 129 shares of the capital stock of the Utica Sunday Tribune Company. The stock of the Utica Sunday Tribune Company owned by the trust had a basis for computing gain or loss upon as alse at the rate of \$225.00 per share, and the stock owned by plaintiff had a basis of \$285.65 for share.

3. The total outstanding capital stock of the Utica Sunday Tribune Company at the beginning of 1922 was 600 shares, held by thirteen stockholders. These stockholders were divided into a "majority" group and a "minority" group, made up of the following persons.

# Majority Green

Hattie C. Fulmer (wife of John)			6	66
Amelia Agne (sister of Hattie)		-	4	44
Henry Roberts Agne (plaintiff, nephew of Amelia)	Hati	ie and	20	
Estate of Jacob Agne (father of plaintiff and		40.00	20	-
Hattie and Amelia)	Dro	ther or		
matte and Ameria)			122	**
			-	
Total		*****	307	shares
Minority Group				
Christian Sautter, Jr	124	shares		
William H. Cloher		46		
Arthur Stappenbeck	46	44		
William I. Taber	20			
T. Harvey Ferris				
George W. Gammel	15			
John H. Stemers.	19	**		
Carrie B. Sherman.	7	**		

- 4. John C. Fulmer, a member of the majority group of stockholders and a trustee of the setate of plaintiffs father, was president and treasurer of the Utica Sunday Tribune Company and in complete charge of its operation. The other members of the majority group relied upon his judgment in all matters respecting the Tribune Company and its stock.
- 5. During the early part of the year 1922, John C. Fulmer negotiated with a newspaper syndicate for the sale of the stock owned by the majority group. The syndicate, after extended negotiations, offered to purchase the entire 600 ehares of stock of the Tribune Company for the sum of \$425,000, payable partly in cash and partly in notes.
- 6. During the month of March 1922, Fuluers secured through agents an option from each member of the nimority group of stockholders to purchase the stock of each at a price of \$500.00 per share. He exercised these options on \$600.00 per share and \$600.00 per shore the exercised these options of \$200 shares of stock for the total sum of \$87,000.00 from a shank using his Tribune Company stock as collateral. At the time these options, Fuluers berowed \$87,000.00 from a bank, using his Tribune Company stock as collateral. At the time these options were given and exercised, the members of the minority group understood that all of the stock of the Tribune Company was to be sold to an outside purchase of the stock of the Tribune Company was to be sold to an outside purchase of the minority group understood that all of the stock of the Tribune Company was to be sold to an outside purchase of the stock of the Tribune Company was to be sold to an outside purchase of the stock of the Tribune Company was to be sold to an outside purchase of the stock of the Tribune Company was to be sold to an outside purchase of the stock of the Tribune Company was to be sold to an outside purchase of the stock of the Tribune Company was to be sold to an outside purchase of the stock of the Tribune Company was to be sold to an outside purchase of the stock of the Tribune Company was to be sold to an administration of the stock of the tribune of the stock of the Tribune Company was to be sold to an administration of the stock of the tribune of the stock of the
- 7. On April 6, 1928, Fullmer delivered the 298 shares of minority group stock to the syndicate and received their check for \$87,900.00, which he used to repay his bank loan of that amount. On the same day Fullmer entered into a written contract with the syndicate, whereby he agreed to written contract with the syndicate, whereby he agreed to Company tock for \$887,100.00, or at the rate of \$1,089.00 per share. This contract reclied that Fulmer was acting for himself and as truste for the remaining members that may be a subject to the majority group of stockholders. It also provided for certain warmaties by the sellent of the financial condition of a trust warmaties by the sellent of the financial condition of the company of the sellent of the property of the contract of

## Reporter's Statement of the Case

8. On April 17, 1922, Fulmer delivered to the purchasers the remaining 307 shares of stock of the Tribune Company and received, for himself, and as trustee for the other members of the majority group, the contract price of \$337,100, partly in cash and partly in notes payable to him, as follows:

	Payments	Interest
Cesh received April 17, 1903. Notes payable and pelid in 1903. Notes payable and pelid in 1903. Notes payable and pelid in 1905. Notes payable and pelid in 1905.	\$137, 100.00 1 92, 500.00 35, 000.00 82, 500.00	\$5, 652.3 6, 073.0 2, 473.0
	\$337, 100.00	\$14, 202. 8

<sup>| 1337, 200.00 | \$14, 200.00 | \$14, 200.00 | \$15, 200.00 | \$14, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 | \$15, 200.00 |</sup> 

plaintiff and others in connection with the sale of the Tribune Company stock were as follows (exclusive of all costs and expenses of litigation which ensued, as hereinafter described, and of judgments rendered as a result of litigation over the sale of the Tribune Company stock):

Receipts	
Sale of minority stock	\$87, 900.0
Sale of majority stock	337, 100. 0
Interest on notes given in partial payment for majority stock	14, 202, 5
Tax refunds due Tribune Co. received 1924.	1, 928. 5
Total receipts	441, 126. 0
Disbursements and Distribution	
Paid minority stockholders, 1922.	\$87,900.0
Commission to newspaper brokers on sale Tribune Co. stock, paid April 19, 1922  Attorner's fee-sale Tribune Co. stock, paid April 19,	10, 927. 5
1922	10, 927. 5
Distributions to majority stockholders:	
Estate Jacob Agne:	
April 19, 1922\$45,797. 21	
March 14, 1924	
June 2, 1924 8,500.00	
Oct. 1, 1994	
Oct. 27, 1924	

Aug. 8, 1925.

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51, 521, 10

114 HENRY ROBERTS AGNE			
			25 C. Oh
	Reperter's Statement of the		
	ons to majority stockholders-Contin	ued.	
	y Roberts Agne (plaintiff) :	AT 100 00	
	pril 19, 1922	\$7, 508. 22	
	une 3, 1924	2,000.00	
	Net. 1, 1904	2, 684. 18	
			\$12, 192. 4
	e C. Fulmer :		
	pril 19, 1922	1,877.84	1,877.8
	a Agne:		
	pril 19, 1922	1,501.64	
3.	Iarch 14, 1924	500.00	
0	Net. 1, 1924	536. 84	
			2, 538. 4
	C. Fulmer:		
	pril 19, 1922	58, 580, 59	
	pril 17, 1924	500.00	
	fay 8, 1924	14, 500. 60	
J	une 2, 1924	7,000.00	
3	une 25, 1924	1,000.00	
A	ug. 1, 1994	1,000.00	
8	lept. 2, 1924	1,500.00	
	Act. 27, 1924	20, 935. 36	
2	iov. 11, 1924	4, 000. 00	
			108, 995, 9
Additions	I taxes of Tribune Co. paid Jan. 1,	1925	357.
Fees and	expenses in connection with Tribun	e Co. taxes	
paid Ja	n. I, 1925		3, 213.
	trust fund per court order in case of		
	thock v. Pulmer, et al.:		
July	10, 1922	12, 875. 00	
Jan.	9. 1925	88, 646, 10	

Total disbursements and distributions..... Excess of receipts-to balance..... \$441, 128, 05

The balance of \$69.923.91 remaining after all disbursements and distributions, was on deposit in a bank account in the name of "John C. Fulmer, Individually and as Trustee," in which account all receipts in conection with the sale of the Tribune Company stock were originally de-

Reporter's Statement of the Case posited. The balance was withdrawn by Fulmer at some leter dete

10. Shortly after the sale of the majority and minority stock of the Tribune Company, the individuals who had composed the minority group of stockholders of that company discovered that the sale of the majority stock had been at a price greatly in excess of that realized by the minority. The minority stockholders threatened suit and suits against the majority stockholders were acutally commenced in the trial division of the Supreme Court of New York State in the following order and upon the following dates:

Minority Stockholders:	Date of Swit
Christian Sautter, Jr.	May 4, 1922
William H. Cloher	May 4, 1922
Arthur Stappenbeck	July 5, 1922
Carrie B. Sherman	Aug. 28, 1924
William I. Taber	Sept. 11, 1928
T. Harvey Ferris.	Sept. 11, 1928
George W. Gammel	Sept. 11, 1928
John H. Slemers	Sept. 11, 1928
The complaints in the several cases were s	mbstantially

similar in that each charged the majority stockholders, and particularly John C. Fulmer, with a breach of fiduciary duty and prayed for an accounting and an equal division of the proceeds of the sale of the Tribuna Company stock among all the stockholders of that company in proportion to their actual holdings. Carrie B. Sherman, one of the minority stockholders, sued John C. Fulmer alone and did not join plaintiff or any other member of the majority group.

11. The first of the cases brought by the minority stockholders, that of Arthur Stappenbeck, was tried in November 1922. Decision was rendered in 1923 in favor of Stappenbeck and the case was referred to a referee for an accounting. Defendants, the majority stockholders, appealed and carried the case to the Court of Appeals of New York where, with minor exceptions, it was affirmed (Stappenbeck v. Fulmer. 223 App. Div. 810, 227 N. Y. S. 909; 249 N. Y. 594, 164 N. E. 597). The referee found, and the court entered judgment on his findings, that each of the majority stock-

Reporter's Statement of the Case holders was liable to Stappenbeck for Stappenbeck's proportionate share of the total proceeds of the sale of the entire 600 shares of the stock of the Tribune Company, with compound interest on such share, less the payment theretofore made to Stappenbeck in 1922 at the rate of \$300,00 per share. The cases of the minority stockholders other than Stappenbeck were tried together, beginning in June 1929, and in each case judgment was given for the complaining stockholder and the case referred to a referee for an accounting. The second referee followed substantially the findings of the referee in the Stappenbeck case except that defendants other than Fulmer were held accountable only to the extent that their proportionate interest in the stock warranted. Fulmer, having been the prime mover and active participant in the sale of the stock, was held liable for the full amount found to be due each of the minority stockholders. Judgments were entered accordingly, appealed from by defendants and finally affirmed. The Stappenbeck judgment became final in 1927 and the other judgments in 1932. 12. Plaintiff reached the age of 30 years in 1925 and re-

ceived distribution of the remaining assets of the trust created under the will of his father and was thereafter liable for the payment of any judgments entered against the trustees of the trust in the suits brought by the minority stockholders of the Tribune Company. Judgments in favor of the minority stockholders were entered against plaintiff and the estate of Jacob Agne in the amount of \$194.331.90. exclusive of court costs. Judgments for court costs entered against plaintiff and the estate of Jacob Agns totaled \$5,087,53. Between December 8, 1928, and March 19, 1935. plaintiff paid the sum of \$91,840.74 upon the judgments entered in favor of the minority stockholders against him and the estate of Jacob Agne. Of this amount, \$75,528.35 was paid to reduce the judgments, and \$16,312.39 was paid upon accrued interest on the judgments. In addition, plaintiff, between December 8, 1928, and February 17, 1934, paid court costs and interest thereon amounting to \$3,635.05. Expenses for attorney's fees and other costs of litigation were paid by plaintiff in the amount of \$15,413.57.

Reporter's Statement of the Case 13. In addition to the payments made by plaintiff, as stated in the preceding finding, he suffered a loss of approximately \$75,000,00 by reason of loss in value of certain assets conveyed by him in trust in 1930 to secure payments of any judgments which the minority stockholders might thereafter finally secure. The trust assets were liquidated in 1985 at a substantial loss and the balance remaining was applied upon the judgments. Plaintiff, since 1935, has been without funds to make further payments upon the judgments and accrued interest still outstanding against him and the estate of Jacob Agne. As shown in finding 9, the sums received by plaintiff, individually and through the estate of Jacob Agne, from the sale of Tribune Company stock. amounted in all to the sum of \$92,943.32, of which \$53,305.43 was received by plaintiff and the estate of Jacob Agne in the year 1922.

of Internal Revenue for his district an individual income tax return, upon the basis of cash receipts and disbursements, for the calendar year 1922 and reported thereon a total income of \$1,151.24 and deductions therefrom, amounting to \$171.88, leaving a total taxable net income of \$8,979.35, upon which there was reported a total income tax liability of \$164.90, which sum was paid with the filing of the return on March 12, 1922.

14. On March 12, 1923, plaintiff filed with the Collector

Schedule D entitled "Capital Net Gain from Sale of Assets Held for More Than Two Years" of plaintiff's return contained the following reference: "See statement attached." Appended to that return was a typewritten sheet reading as follows:

In 1922 I sold twenty shares of stock in the Utics Sunday Tribune Company, a corporation, pursuant to a contract of sale containing a number of guarantees which may result in payments which I will have to make and which, at this time, are not determined as to amount.

I, together with John C. Fulmer, Hattie C. Fulmer, Amelia Agne, and Estate of Jacob Agne owned the controlling interest in said corporation and in connection with the above sale I received \$21,962.07, partly in cash and partly in notes running over a period of 41%

Reporter's Statement of the Care years. The minority stockholders sold their stock to the same purchasers and thereafter three of the minority (there were eight in all) brought actions in the Supreme Court against me for damages on the ground of fraud and deceit in connection with the stock sale. Other suits are threatened. All of the actions are undetermined at this time, one was tried in the Supreme Court in November, 1922, but no decision has, as yet, been rendered. It is impossible for me at this time to determine what my net gain or loss will be from the transaction owing, partly to the fact that the suits are undetermined, and partly to the fact that I do not know at present what my expenses in the litigation will be. A statement at this time as to the transaction arriving at a gain or loss would be entirely guesswork. As soon as these matters are determined I will request permission to file an amended return for the year 1922.

Ages also filed a timely return for the calendar year 1922, showing the recipiest and dishursements of the trust. All net income thereof was distributed within the year to platinifi, including the total amounts received by the trust in that year from the sale of 122 shares of capital stock of the Tribune Company. Appended to the return of the trust was a statement dealing with the sale of the Tribune Company. The product of the statement dealing with the sale of the Tribune Company of the statement of the state

The trustees of the trust created by the will of Jacob

15. The Commissioner of Internal Revenue took the position that plainful was taxable in the year 1920 upon a profit derived from the sale of the shares of Tribune Company will of Jacob Agna, measured by the difference between the total contract price for the stock, tens certain discounts for note maturing after 1920 and certain expenses, and the basis of the stock in the hands of plaintiff and the trust. It was not to the stock in the hands of plaintiff and the trust. It was not to the stock in the hands of plaintiff and the trust. It was not to the stock in the hands of plaintiff and the trust. It was not to the stock in the hands of plaintiff and the trust interplay assessment against plaintiff of additional taxes for the calendar year 1922 in the amount of \$9,000.00 on a list dated Spetember 10, 1927, and this sum, together with accrued interest, amounting in all to \$13,575.60 was, after date for the stock of the stock of

plaintiff filed with the Collector of Internal Revenue a formal claim for evidend of \$35,372.06 no assessed and paid. A second of the collection of Tribune Company stoke constituted gross income to plaintif for the year 1922, and in the alternative, that only so much of the proceeds now see actually received by him to 1922 could constitute gross income to him in that year. The claim was rejected by the Commissione to him in that year. The claim was rejected by the Commissione to him in that year. The claim was rejected by the Commissioner on a schedule that the collection of the commission of the collection of the co

The court decided that the plaintiff was not entitled to recover.

Madden, Judge, delivered the opinion of the court:

Plaintiff in 1922 owned 39 shares of the capital stock of the Uties Sunday Tribune Company, a corporation publishing a daily newspaper in Uties, New York. A trust under the will of his father, Jacob Ages, of which trustsynplaintiff was the sole beneficiary, owned 192 shares of the same stock. The income tax base value of plaintiff's 90 shares was \$283.76 per share and of the 192 shares in the trust was \$252 per share.

Trustees of the trust were plaintiff's muche by marriag, John C. Pulmer, and plaintiff's aunt, Amelia Agne. Fulmer was the largest individual stockholder in the Tribune Company. Plaintiff and other members of his family relied upon Falmer's judgment in all matters respecting the Tribune Company and its stock. The family group, which included Fulmer, the estate of plaintiff's father, and plaintiff and his two sunts, owned a majority of the Tribune Company stock, 307 out of 600 fathers. The balance of 350 dataset are removed by agist individuals, who composed a

minority group. Early in 1922 Fulmer negotiated a deal whereby an outside purchaser offered to purchase the entire 600 shares of the Tribune Company stock for \$4250,000. Fulmer then bought the 293 minority shares at \$300 per share and turned them over to that nurchaser. At the same time he contracted with the purchaser to sell the remaining 307 there is \$837,100, or \$1,008 per share. In this contract Flusher was described as acting for himself and as trustes for the worker of the first the state of the contract contained certain warranties with respect to the financial condition of the Tribune Company, certain ediligations assumed by the sellers with respect to the Company's income are contracted to the contract contained certain warranties with respect to the Company's income assumed by the sellers with respect to the Company's income arease in commeltion with the nurshear, by group not to example in commeltion with the nurshear by group not to the contract of the

At the time Fulmer purchased the 898 shares of minority stock for reals, the owners of that stock understood that all the stock of the Tribune Company was to be sold, but they did not know that the stock owned by the majority and group was to bring a higher price than \$300 per share and they supposed that both the majority and minority shares were to sell for the same price.

April 17, 1929, Fulmer consummated the sale of the \$07

shares of the majority stock and received the purchase price in cash and notes payable to him and paid to him when due, as follows:

Uksb.		-				\$187, 100.	U,
Notes	payable	and	paid	in	1922	92, 500.	00
Notes	payable	and	pald	in	1923	25, 000.	00
Notes	payable	and	paid	in	1924	82, 500.	00

The cash payment and the payments on the notes were deposited by Futners in a bank second in the name of "John Control of the payment of the payment of the control of the payment of the payment of the payment of Planistiff received \$7,50.822 and the trust under the will of planistiff sather received \$45,670.21, which it passed over to planistif in 1922, who thereby received a total of the payment of the Shortly after the sale of the najority and minority stock of the Tribune Company, the minority group discovered for the Tribune Company, the minority group discovered greatly in excess of that received by the minority. All the minority stockholders used for an accounting. Three of these suits were commenced in the year 1922. The majority group, including plaintiff and the trust, were charged with a breach of flowinger duty to the minority.

The first of these suits to be tried was decided in 1926, in favor of the minority stoch-lobel. After appeal, judg-ment became final in 1967. Final judgments against plantiff and the state were entered in 1923. Judgments against plantiff the state of t

Plaintiff's income tax return for 1922 was filed on March 12, 1923, on a cash basis. It did not report any taxable profit on the sale of the Tribune Company stock. Attached to the return, however, was a statement relating some of the story of that sale as it had developed up to the date of the return and closing with this statement:

It is impossible for me at this time to determine what my net gain or loss will be from the transaction owing partly to the fact that the suits are understood to the contract of the contract

A similar statement was attached to the tax return for 1922 of the trust of which plaintiff was the beneficiary. The Commissioner of Internal Revenue determined that plaintiff had realized a profit in 1982 upon the sale of his own stock in the Tribune Company and also upon the sale of the stock owned by the trust under his father's will. The Commissioner's determination of profit was based of the stock owned by the trust under his father's will. So that the stock in the stock in the stock of the stock of stock, less expenses, and discounts to bring the value of the notes down to their present worth, and the cost or other basis of the stock in the hands of plaintiff and the trust. Additional taxes and interest for 1929 were accordtant. Additional taxes and interest for 1929 were accordtant and the stock of the stock in the amount of \$13,572.06. Plaintiff and and collected in the amount of \$13,572.06.

Plaintiff contends that he and the trust did not, in 1922, neceive from the sale of the Tribune stock any amount which could properly be regarded as gross income, because, as he contends, the transaction was incomplete. He claims, in the alternative, that if he received any amount of income, it was only \$20,050.23, the amount by which the cash which he received in 1925 from the sale exceeded the stock's basis.

We think plaintiff received in 1922, within the meaning of the statute and the applicable regulations, the amount which the Commissioner used to compute his assessment The sale of the stock was complete in that year. The warranties and covenants made by the vendors no more kept the transaction inchoate than would a warranty of title, or a covenant to observe certain building restrictions on land retained, or not to compete with the vendee, keep a sale of land from being complete for income tax purposes. Cases such as Virginia Iron, Coal & Coke Co. v. Commissioner. (C. C. A. 4) 99 F. (2d) 919, involving an executory contract for the sale of land are not apposite. In such cases it cannot be determined until later whether the property will ever be sold or the taxpayer will continue to own it. If the option is not exercised or if the vendee under the contract fails to perform his part of the contract, there will be no question of capital gain or loss for the vendor will still have his capital. We conclude, therefore, that there was a completed sale in 1922.

Plaintiff's second contention is, as we have said, that assuming that there was a sale in 1922, he "received" for

Oninion of the Court tax purposes in that year, only the amount which came into his hands and that of the trust, and can be taxed only on the excess of that amount over the base value of the stock. The cash and notes all came, in 1922, into the hands of Fulmer. The cash, less expenses, was distributed and plaintiff received his share. The notes had a "readily realizable market value" within the meaning of Section 202 (a) (3) (c) of the Revenue Act of 1921 (42 Stat. 227, 230), and of Treasury Regulations 62 (1922 edition), article 1564. Although they were payable to Fulmer, he was the agent or trustee of plaintiff for plaintiff's proportionate share of them. If plaintiff had been the sole beneficiary of Fulmer's agency or trusteeship of the notes, he could have demanded their transfer to him. As it was, he was as much entitled to have possession of them as any partner or other co-owner is entitled to have possession of the common property. In short, his proportionate share of the notes became, in 1999, his property in the hands of his agent or trustee. In view of what is said in the next paragraph of this opinion, the fact that a small amount, some \$12,000, of the funds in Fulmer's hands was in 1922 by court order subjected to a trust to satisfy the possible outcome of the Stappenbeck litigation

to the control of the

If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.

See also McDuffle, Trustee, v. United States, 85 C. Cls. 212; Schromen v. United States, 93 C. Cls. 181. 95 C. Cla. Concurring Opinion by Judge Jones

Our conclusion is that plaintiff was not overtaxed and is not entitled to recover. His petition is, accordingly, dismissed.

It is so ordered.

Whitaker, Judge; Lattleton, Judge; and Whaley, Chief Justice, concur.

Jones, Judge, concurring:

I concur in the result, but for a different reason,

Plaintiff is endeavoring to escape the consequences of an illegal transaction, as disclosed by his own pleadings and

the documentary evidence of record.

Since suits were filed by minority stockholders during the taxable year, 1922, the year of receipt, it is doubtful whether

the tarpayer received the earnings "under a claim of right with full power of control and disposition." The exercise of any such power over a portion, at least, of such funds was prevented by court order made in 1922. Even conceiling that the taxes were properly assessed in

Even conceding that the taxes were properly assessed in 1992, there is some question whether plaintiff might not have the right to a refund on the facts, later revealed, showing that he did not own a certain perentage of the monies and notes that were received, but that such percentage actually belonged to the minority stockholders. On that percentage plaintif had paid taxes on property that belonged not to him but to other.

On account of the apparent fraud on the minority stockholders, with which plaintiff was intimately connected, or at least had knowledge and with such knowledge became, or was willing to become, the beneficiary, he is not equitably entitled to recover.

To avoid any possibility that a subsequent taxpayer with a just cause might be foreclosed on the other issues, I prefer to place the decision on the latter ground.

Plaintiff having sought to benefit from an illegal transaction may not now recover on the showing that his attempt failed

# RUST ENGINEERING COMPANY V. THE UNITED

[No. 43302. Decided December 1, 1941]

### On the Proofs

Government contract; specifications carelessly written and ambiguoue.-Where plaintiff entered into a contract with the Government to furnish all labor and materials and to perform all work required for the construction of a complete steam generating plant, to be known as the Central Heating Plant for Public Buildings, in the District of Columbia; said contract including furnishing and installing all necessary electrical wiring, as set forth in the specifications, and for which electrical work plaintiff contracted with a subcontractor, which subcontractor based its bid on wiring and insulation approved by the National Electrical Code, as called for under one paragraph of the original specifications; and where said original specifications were carelessly written and contradictory; and where under amended specifications plaintiff was required to install, and did install, a more expensive insulation; it is held by the court that the ambiguity in the original specifications

install, and did install, a more expensive insulation; it is held by the court that the ambiguity in the original specifications should be received in plaintiff's favor, and plaintiff is entitled to recover. Some.—Where the specifications are carelessly written and ambiguous,

contractor is not licensed to disregard such portions as are plain.

Some; illegal installation.—If an owner invites bids for an illegal installation, the bidder is not privileged to submit a bid, and, if it is accepted, claim that he has a contract for a much cheaper hawful installation.

## The Reporter's statement of the case:

Mr. Alexander M. Heron for plaintiff. Messrs. Bynum E. Hinton and William L. Owen were on the brief. Mr. Herman J. Galloway was of counsel.

Mr. H. A. Bergson, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant. Mr. Joseph C. Duggan was on the brief.

The court made special findings of fact as follows:

 Plaintiff is a corporation organized under the laws of the State of Delaware, with an office and place of business in the city of Pittsburgh, Pennsylvania.

449973-42-CC-rol. 95---10

2. On December 23, 1892, the defendant, represented by assistant Secretary of the Treasury Ferry K. Heath as contracting officer, entered into a contract designated T128-860 with plaintial whereby for \$1,869,000 plaintiff agreed required for providing a complete steam generating plant, to be known as the Central Heating Plant for Public Buildings, to be situated at a determined location in the District Columbia. Made a part of the contract leves neglections due to Columbia. Made a part of the contract leves neglections due to Columbia. Made a part of the contract wave special coins due to Columbia. Made a part of the Sorwise 100, and November 29, 1908, bullen the total due! November 20, 1908, bullen 21, 1908, November 20, 1908, to November 20, 1908, and November 20, 1

The furnishing and installation of electrical wiring was included in plaintiff's contract, and forms the sole subject matter of this suit.

This work included furnishing and installing (1) wiring outside the building, running underground and in tunnels, most of which was power and light cable to carry 600 volts as most of which was power and light cable to carry 600 volts or bessent with and coilings, to carry 600 volts or less; (3) wiring on the main floors of the building around and above the boiler locations, most of which was to carry 600 volts or less; (4) wiring on the main floors of the buildings in the building of the buildings of less than 100 volts or less; and (5) wiring fin the building to carry 2,200, 4,000, and 5,000 volts. Wires and cables to carry 1,800 volts or less; and (5) wiring the work of the building in the building to carry 2,200, 4,000, and 5,000 volts. Wires and cables to carry less than 600 volt insulation and wives and cables to carry more than 600 volt insulation and volve and cables to carry control to the carry more than 600 volt insulation and volve and cables to carry the carry more than 600 volt insulation and to 1,000 volts and up to 1,000 vol

The wires consisted of copper conductors around which was placed insalating material. The size of each copper conductor was precisely specified in the contract requirements in terms of the accepted commercial designation as to size. All wiring was required by the specifications to be placed in conduits, which are a form of selet tubing or pipe usually installed in the concrete walls or floors of the building at the time of their construction.

The electrical wiring was to be installed before the project was put into operation.

Reporter's Statement of the Case All electrical wiring under the contract was furnished and installed by a subcontractor.

4. Article 1557 of the specifications provided:

1557. Standards.—In the furnishing and installing of

all electrical work, the Contractor shall comply strictly with the latest edition of the National Electrical Code of the National Board of Fire Underwriters for Electric Wiring and Apparatus. He shall also comply with the latest standards of the American Institute of Electrical Engineers wherever applicable.

Article 1713 of the specifications was as follows:

1713. Wires and Cables.-All wires and cable, whether braided or lead-covered, except "Parkway cable, wires for the pressure indicating circuits, and signal systems, shall be of the flame-proof type, built to meet the "Navy Department Specification" No. 15C1G. dated May 1, 1931, which may be obtained from the Bureau of Supplies and Accounts, Navy Department, Washington, D. C.

Article 11 of the Specifications provided:

11. Explanations to Bidders.—No oral interpretation will be made to bidders as to the meaning of drawings and specifications. Requests for such interpretations should be made in writing, addressed to the Supervising Architect. Any interpretations made to bidders will be in the form of an addendum to the specification. which if issued, will be sent to all bidders 10 days before the opening of bids upless the preency of some interpretation warrants an earlier date.

Some time before any of the wiring had been installed. it was discovered that many of the conduits specified were too small to contain wires insulated with the thickness of insulation called for in Navy Specification 15C1G.

On March 16, 1933, United Engineers & Contractors. Inc., supervising engineers for the Government, wrote plaintiff as follows:

In view of the unusual thickness of insulation on flame-proof cable, called for by "Navy Department specification" No. 15C1G, dated May 1st, 1931, it is requested that you submit your proposal for the deduction you will allow from the contract price in the event that paragraph 1713 of the specification should be

Reporter's Statement of the Case modified to read as given on the attached draft of

proposed revision. In this connection please consider the possibility of saving arising from the opportunity to use smaller

conduits in locations where the conduit sizes have not been specified on the plans and specifications but have been allowed to be determined after the proper sizes of wire for control in signal circuits, etc., have been selected.

Please submit the proposal in quadruplicate (2 copies to be signed). Proposal should be addressed to the Office of the Supervising Architect and mailed to this Company at Post Office Box 356, Washington, D. C., unless delivered by messenger.

The draft of the proposed revision of paragraph 1713 of the specifications, attached to this letter, was as follows:

# PROPOSED REVISION OF PARAGRAPH 1713 OF SPECIFICATIONS

1713. Wires and Cables .- All wires and cables whether braided or lead covered except Parkway Cable, wires for the pressure indicating circuits, and signal systems, shall be of the flameproof type built in accordance with the Navy Department Specifications Number 15C1G, dated May 1, 1981, except as to thickness of insulation and covering, which shall be as specified in the following

Sine uwg. buco	Solid or stranded	First felted wall	Varnished escabric	Becord felted wall	Outer braid	ô.B.
(0 (0 (0 (0 (0 (0 (0) (0) (0) (0) (0) (0	Solid. Stranded	0. 605" .005	3-0.08° 2-00° 3-00° 3-00° 3-00° 3-00° 3-00° 3-00° 3-00° 3-00° 3-00° 3-00° 3-00° 3-00° 3-00° 3-00° 3-00°	0. 020" 020" 015" 015" 015" 015" 015" 030" 030" 030" 030" 045" 045" 045" 045" 045"	0. 645" 045" 045" 045" 045" 045" 045" 045" 045" 045" 045" 045" 045" 045" 046	0. 244° 287° 360° 383° 409° 600° 502° 502° 700° 700° 809° 971° 1. 100°

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Reporter's Statement of the Case SINGLE CONDUCTOR-600 V-LEAD COVERED

las swg. baro	awg. Solid or steamhol		Varnished cambric	Second felted walt	Lead sheeth	APP.	
000 000 000 000 000 000	Solid. Strauded.	0.018" .018"	3-4.000° 3000° 3000° 3000° 3000° 3000° 3000° 3000° 3000° 3000° 3000° 3000° 3000° 3000° 3000° 3000° 3000°	0, 630° 600		6.289" -322" -329" -419" -446" -450" -500"	
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Stee awy. bazo	Solid or atranded	First felted wall	Varnished cambric	Second Silted wall	Outer breid	å.b.
2 1 20 20 40 40 40 200,000 200,000 200,000 200,000 200,000 200,000 200,000 200,000	Stranded	0.015" .015" .015" .015" .015" .015" .015" .000" .000" .000"	12-6,000" 13- 500" 13- 500" 13- 500" 13- 500" 13- 500" 13- 500" 13- 500" 13- 500" 13- 500"	0.035" .000" .000" .000" .000" .000" .045" .045" .045"	0.045" .048" .048" .045" .045" .045" .046" .049" .049" .049"	0.705" 742" 784" 880" 946" 1.048" 1.109" 1.111" 1.109"

2 1 0 2/0 8/0 4/0 250,000 300,000 251,000 600,500 502,600		0.015" .015" .015" .015" .015" .015" .015" .030" .030" .030" .030"	12-0.000° 12000° 12000° 12000° 12000° 12000° 12000° 12000° 12000° 12000° 12000°	0.000" .000" .000" .000" .000" .000" .045" .045" .045"	0.045" .045" .045" .045" .045" .045" .045" .045" .045" .045"	0.705' .742' .781' .880' .940' 1.048' 1.109' 1.111' 1.199'
Sine awg.	Solid or stranded	Phot foliod wall	Varnished eambele	Second felled wall	Lead aboath	årg;
1	Strapded	0.015" .015" .019"	13-0.000" 13000" 13000"	8.090" .039" .039"	#5	0.740*

Nove.—To allow for variation in magnifacture a telerance of \$% plus or minus will be allowed in the outside diameter of finished cable.

95 C. Cla.

Reporter's Statement of the Case Multiple conductor control cables shall be manufactured as follows:

Individual conductor #19/22 shall be covered with-First felted wall of asbestos 0.015" thick,

Three layers 0,006" varnished cambric, Second felted wall of asbestos 0.015" thick, Color coded cotton braid. The assembled conductors with jute fillers if required

for circularity, shall be covered with a moisture-proof tape and overall with an asbestos braid 0.045" thick. Where lead-covered control cable is required a lead sheath shall be substituted for the outer braid. Thickness of lead sheath shall be in accordance with Table VI of the Insulated Power Cable Engineers Association Specifications.

Multiple conductor cable for general use shall be manufactured as follows: Individual conductors shall be insulated as covered in

the tables for that size and service, except a cotton braid shall be substituted for the asbestos braid, and the assembly covered with a moisture-proof tape and 0.045" asbestos outer braid or lead sheath of thickness called for by Table VI of the I. P. C. E. A. Specifications. The copper in all conductors shall have a conduc-

tivity of not less than 98% of the I. A. C. standard. All felted ashestos layers and all outer braids shall be impregnated with a flameproof and moisture-resisting compound.

6. After further correspondence, plaintiff replied to the request of United Engineers & Contractors, Inc., on June 27, 1933, in the following letter to the Supervising Architect:

In reply to your letter of June 20, which refers to the wiring in the Central Heating Plant for Public Buildings, Washington, D. C., we are pleased to submit herewith our proposal to install wiring throughout the plant of exact construction specified, but of insulated thickness as furnished us in the schedule as prepared by the United Engineers and Constructors, under date of March 16, 1933.



Our	estimate	for	this	work	is	88	follow	s
A	dditional	Cost.			_			\$

10% Profit 10, 725. 00 1, 072. 50 11, 707. 50

We would appreciate your advice concerning this matter.

 On August 30, 1933, Assistant Secretary of the Treasury L. W. Robert wrote plaintiff as follows:

In connection with your contract for a complete steam generating plant for the Central Heating Plant for Public Buildings, this City: reference is made to the question of the electric wiring which has formed the subject of much correspondence and many conferences, and in connection with which your representative has appeared before the Board of Award. Briefly, the conduits specified are not of sufficient size to permit installation of the special heavily insulated wire specified, and to change the conduits at this time would be very expensive or practically impossible. Several solutions of the situation have been offered, and the best seems to be that covered by your proposal of June 27th, to install the wiring as specified in the conduit as specified, but with a thinner insulation, and for this change which logically would call for a deduction, you name in your said proposal an addition of \$11,797.50, based on an additional cost claimed by you of \$9,750.00 to which you have added the usual 10 and 10. Accompanying your proposal is the itemization of your subcontractor showing his original estimate on which he based his contract, and the revised estimate "using wire figures as per schedule prepared by United Engineers and Constructors dated March 16, 1983." The only difference in these figures appears under the item "Wires and Cables" for which is shown under the original estimate \$5,995.06 and under the revised estimate \$15,745.06, or a difference of \$9,750.00. Your subcontractor for the wiring alleges he did not base his proposal to you on this special wire clearly called for

by the contract (evidently having figured there would have to be a necessary adjustment), and for this reason could not make a deduction for the thinner insulation. In order not to delay this work, and in order that it may be installed with the wiring and conduit specific, but with the thinner insulation, you are ordered each, but with the thinner insulation, you are ordered of June 97, 1938, subject to subsequent adjustment of of June 97, 1938, subject to subsequent adjustment of contract price which it is evident should be a deduction

8. Section 5037 of the National Electrical Code, omitting immaterial parts, provided:

J. Conduit wire shall be of approved rubber-covered type \* \* \*, or, if in a permanently dry location, may be of the varnished-cambric insulated type. \* \* \* \* Slow-burning insulation \* \* or asbestoe-covered wire shall be used in permanently dry locations where the ambient temperature of the wire as installed, will exceed 120 deg. £ (49 deg. C.).

# Section 503p provided:

instead of an addition

p. For conduit wiring installed underground or in concrete slabs or other masoury in direct contact with moist earth, or in other permanently moist locations where subject to the condensation of moisture, the conductors shall be of the lead-covered type, or of other type specially approved for this purpose.

Section 600 stated that varnished-cambric-covered wire was not intended for use where moisture existed and 604 stated that subsetos-covered wire was especially useful in ho, dry places where ordinary coverings would perish, and where writes were bunched as on the back of a large switchboard or in a write tower, in which the accumulations of rubber covering would result in a large snase of highly inflammable manegial, and it was stated to be not existable for

The only flameproof conduit wire insulation considered in the National Electrical Code was asbestos, and asbestos insulation was not therein classed as moisture-resistant or moistureproof.  The flameproof insulation described in Navy specifications 15CIG was asbestos. The asbestos insulation required was described therein as follows:

 The asbestos roving or felting and yarn shall be made from the best quality of long-fiber asbestos, and shall be free from metallic oxides. It shall contain not

more than 15 percent of cotton.

2. The insulation shall be applied so as to provide a circular cross section in which the conductor shall be well centered in the insulating wall. The absets over the conductor, including both roving and braid, shall be thoroughly impregnated with a moisture-resisting lieu-

the conductor, including both roving and brack, sain we thoroughly impregnated with a moisture-resisting insulating compound in such manner as to completely fill all interactions and make the insulation one homogeneous structure.

8. The compound used to saturate the asbestos shall consist of suitable high-grade ingredients and shall retain its initial qualities during the life of the cable. The compound shall develop no injurious chemical action within itself or with any other of the competent parts of the completed cable.

4. The finished insulation shall be of such composition and structure as will enable the cable to meet the bending, elongation, flameproofness, and dielectric strength tests outlined in paragraph 6 herein.

Navy specifications 15CIG were issued for shipboard use and were designed to meet the needs of seagoing craft in which heat and moisture played an important part. 10. Of the flameproof cable described in Navy specifica-

10. Of the flameproof cable described in Navy specifications 15ClG types SFPC-3 and SFPC-4 to 7 are therein described as follows:

#### ribed as follows:

Type SFPC-3:
First. The conductor shall consist of 7 copper wires (4b), each 0.025 inch in diameter, stranded with a right-hand lay.

Second. A felted layer of asbestos (4g), applied in the form of untwisted asbestos roving, compressed and impregnated with a black neutral insulating cement to form a continuous and homogeneous layer not less than 0.000 inch in thickness.

0.000 inch in thickness.

Third. A closely woven, uniform, asbestos braid (4g); the braid shall be impregnated with a black flameproof insulating coment.

Reporter's Statement of the Case
The diameter of the completed cable shall not exceed

0.250 inch. Types SPPC-5 to 7 (single conductor): Single-conductor power cable in the flameproof construction shall be made up in accordance with the following description and table of dimensions:

First. The stranded conductor (4b). Second. A layer of felted asbestos (4g), applied in

the form of untwisted asbestos roving, compressed and impregnated with a black, neutral insulating cement, to form a continuous and homogeneous layer. Third. Varnished cambric insulation, minimum of

three layers (4d).

Fourth. A layer of felted asbestos, applied as in

"Second" above.

Fifth. A closely woven, uniform assestos braid (4g);
the braid shall be impregnated with a black, flameproof

insulating cement.

The dimensions shall be not greater than the values shown in the following table, nor less than 92½ percent of those values:

		Copper data				Insulated cable			
Type	Actual circulae mills	Num- bar of wires per con- ductor	Distri- oter of wire	Diazz- eter over copper	Diam- eter over first felted ashes- tos	Diam- elec over ver- nished cam- bric	Diam- over second felted asbes- tos	Diam eter over asbes- tos braid	
8FPC-4 8FPC-5 8FPC-6	75, 880 95, 820 187, 880 295, 660	37 61 61 91	Jnch 0.045 .040 .061 .067	Inch 0.217 .363 .457 .626	Inch 0.407 .453 .547 .718	Pack 0.515 .881 .665 .806	Znoh 0, 835 .681 .745 .916	Inches 0.65 .74 .80 1.00	

The insulation specified in SFPO 3 could be used to carry 600 volts and under. For such capacity it compiled with the National Electrical Code for us in dry locations. That insulation would not be adequate for more than 600 volts. Wires to carry more than 600 volts required insulation of the type described in SFPO 4-7, but the thickness of varnished cambric insulation would have to be increased as prescribed by ecod manufacturing standards.

11. In preparing its bid plaintiff and its subcontractor disregarded the Navy specifications for flameproof insulation and based the estimate on rubber insulation which conformed Opinion of the Capit
to the National Electrical Code. It is not proved that
plaintiff was aware at that time of the fact that the wires
in the Navy Specification were too large to be drawn through
some of the conduits.

12. The wiring furnished complied with the March 16, 1983, revision of Article 1713, and the parties have agreed that this revision required a change in the contract price, but have not agreed as to the direction nor the amount in which the price should be changed.

13. Plaintiff performed all of the work required by the contract and the revisions thereof, and on June 89, 1993, received check No. 2645, in the sum of \$14,988.74, the last payment on the work done under the contract, subject to the understanding that plaintiff thereby waived no righther to make further claim under the contract. No deduction from or addition to the contract to No deduction from or addition to the contract price was made as a result of the revision of purarranh No. 1713 of the secilifications.

14. The reasonable value of the wire installed pursuant to the revision of March 16, 1933, was \$21,428.62.
The reasonable value of the wire on which plaintiff hased

its bid (see finding 11) was \$6,229.41.

The reasonable value of wire meeting the requirements of Navy Specifications 15C1G without regard to the impossi-

bility of drawing it through the conduits specified by the contract, was \$16,646.69.

The court decided that the plaintiff was entitled to recover.

Madden, Judge, delivered the opinion of the court:

Plaintiff was the successful bidder for a contract to construct for the defendant in the District of Columbia a complete steam generating plant to be known as the Central Heating Plant for Public Buildings. The contract was made on December 21, 1992. The contract price was \$1489.900.

This suit relates to the electrical wiring installed by plaintiff under the contract. Plaintiff has been paid the full contract price for the job as a whole, but claims \$18,-391.04 as extra compensation because of a change made in the specifications for wiring after the contract had been made. The circumstances of the change were as follows.

Article 1567 of the Specifications which was in that part
of the Specifications relating to electrical work as a whole
provided:

1637. Standards.—In the furnishing and installing of all electrical work, the contractor shall comply strictly with the latest edition of the National Electrical Code of the National Board of Fire Underwriters for Electric Wiring and Apparatus. He shall also comply with the latest standards of the American Institute of Electrical Engineers wherever applicable.

Article 1713, which relates specifically to the electric wires and cables to be used, provided:

1713. Wires and cables.—All wires and cable, whether braided or lead-covered, except "Parkway" cable, wires for the pressure indicating circuits, and signal systems, shall be of the finan-proof type, built to meet the "Navy Department Specification" No. 15C1G, dated May 1, 1861, which may be obtained from the Bureau of Supplies and Accounts, Navy Department, Washington, D. C.

In March 1933, the supervising engineers for the Government wrote plaintiff asking how much of a deduction would be allowed if a proposed accompanying revision of paragraph 1713 were followed which reduced the thickness of the layers of insulation on the wires. Plaintiff's proposal in response was that there should be an addition to the original price of \$11,797.50. In August 1933, the defendant wrote plaintiff, referring to the fact that there had been much correspondence and many conferences about the question in the meantime, stating that the conduits specified were not large enough to contain the thickly insulated wire specified, and ordering plaintiff to proceed with the installation according to the March proposed revision of article 1713 "subject to subsequent adjustment of contract price, which it is evident should be a reduction instead of an addition." Plaintiff thereupon proceeded to install the wiring as directed and to complete the contract otherwise. The defendant paid the unpaid balance of the contract price, which plaintiff received on the understanding that it did not waive its rights to make further claims under the contract.

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Opinion of the Court Since the 1933 revision of the wiring specifications reduced the thicknesses of the layers of insulation on the wires, the defendant's assertion in its August 1933 letter that the price should be revised downward would seem to be well founded. But plaintiff claims the price should be increased. and is suing here for that increase. It says that the specifications, before the 1933 revision, were ambiguous: that they required that the installation be in compliance with the National Electrical Code as well as with the Navy Department Specification 15C1G; that the Navy specifications related to wire, the diameter of the conductor or metal core of which was measured in thousandths of inches, which even when translated into units of circular mills were not equivalent to the gauges expressly stated in the specifications; that the flame-proof type of insulation required by article 1713 and by the Navy specifications for insulation were not sanctioned by the Code for installations requiring moisture-proof insulation: that plaintiff's subcontractor for all the electrical work, in making up its estimate for its bid on the contract, intended to resolve the ambiguity by using the sizes of metal conductors set out in the specifications, covered with insulation approved by the National Electrical Code, viz. rubber insulation; that such wiring would have cost only \$6,229.41, whereas the wiring actually installed under the revised specifications was worth, as the defendant concedes, \$21,428.62; that plaintiff should therefore recover the difference, or \$15,199,21. Plaintiff also claims the right to add 10% for profit and 10% for overhead, making a total of \$18,891,04

It is sipulated by the parties that plaintiff subcontractor did make its estimate on the basis described above. Our question is whether it was justified in so doing on a to entitle plaintiff to extra compensation for finally making a more expensive installation. As we have said, the National Elserical Code requirement was given in a part of the specifications relating generally to all the electrical material related specifically to the wiring; it said expressly that the insulation should be flame-proof, which rubber insulation is not; it said the insulated wire must be "fluit to meet the "Navy Department Specification" No. 18C1G, dated May 1, 1831, which may be obtained from the Bureau of Supplies and Accounts, Navy Department, Washington, D. C.". The Navy specification of asbestos and varnished cambric is plain.

On these specifications, plaintiff and its subcontractor had no right to disregard the plain specification of flame-proof insulation to be built up in a specified way of specified materials, and submit its bid on the basis of a different and cheaper insulation. The specifications were carelessly written, but that did not license plaintiff to disregard those portions of them that were plain. If it had occurred to plaintiff when making up its bid that there was an inconsistency between the general requirement that all the electrical installation should conform to the National Electrical Code, and the particular requirement that the insulation be flame-proof and of a particular type, it should have done what the invitation for bids provided, make a request for an interpretation addressed to the supervising architect. This should also have been its procedure if it was troubled by the fact that, as it claims, the Navy specifications for insulation were in violation of an applicable Regulation issued under the District of Columbia Code. We do not decide whether or not the Code was applicable. If an owner invites bids for an illegal installation, the bidder is not privileged to submit a bid and if it is accepted, claim that he has a contract for a much cheaper lawful installation. In any event the claim of illegality seems to be an afterthought as the revised specifications under which plaintiff made the installation without raising any question of illegality, were also in violation of law if the original Navy

Plaintiff says that even if it should have estimated its bid on the basis of the Navy specification of flame-proof insulation, it should have counted only on using the type and thickness of insulation called for by Navy specification SFPC 3, which was asbestos with no varnished cambric, and which while more expensive than rubber, was considerably cheaper than that called for by Navy specification SFPC 4-7, which required two layers of absects and a layer of var-

specifications were.

nished cambric between them, and was a thicker cable. The specifications required insulation sufficient for 600 volts on all wires carrying any load less than 600 volts. The defendant's expert testified that wires insulated according to SFPC 3, installed as these were to be installed, were not adequate for 600 volts. Plaintiff's experts testified that they would carry 600 volts, but upon cross-examination said they would not advise their use for so heavy a load. In view of the fact that the specifications were carelessly drawn, and that a choice was to be made which plaintiff might, not altogether without reason, have made as it contends, we resolve the ambiguity in the specification in plaintiff's favor and treat it as if it had bid on SFPC 3 for the wires carrying no more than 600 volts. As to those carrying more than 600 volts, the Navy specifications gave no exact directions. Plaintiff should, however, have counted on their being "flame-proof" and on using the cambric and asbestos insulation called for by the Navy specification, and on their being built up to good manufacturing standards as any manufacturer would have known how to do given the size of the metal conductor, the voltage to be carried, and the insulating material to be used.

The actual installation made under the revised specification used the type of absence and varnished cambric instalation culled for in SFPC-4-7, but with thicknesses of insulation reduced so that the wirse would go into the conduits, but made the wirse carrying less than 600 volks more expensive more than 600 volks, as actually installed, were probably less expensive than the ones that should have been estimated for, since the thickness of the insulation was reduced.

The fact that the Navy specifications, as we are asked by the defendant to interpret them, called for insulation so thick that wires thus insulated could not be drawn through the already installed conduits seems to have had nothing to do with the amount of plaintiff's bid. There is no proof that plaintiff was avera of this fact when it made its bid. If it had been so aware, it would still not have been privileged to all the plaintiff was averaged to the property of the of a wholly different and chazer material. We conclude, therefore, that plaintiff's bid, on the basis of rubber insulation, may not be used in determining whether and how much the revised specifications increased the cost about have been the revised specifications increased the cost about have been the basis of plaintiff's bid. On that basis performance under the revised specifications cost \$241,288.02. It is entitled to recover the difference of \$475.12.8, together with an allowance of \$475.00 for overhead and a profit of ten prevent, or \$250.01, on the sum of excess cost and overhead. This makes a total of \$5,762.14 and judgment will be entered for plaintiff in that amount.

Jones, Judge; Lettleron, Judge; and Whaley, Chief Justice, concur.

WHITAKER, Judge, took no part in the decision of this case.

DOUGLAS AIRCRAFT COMPANY, INC., v. THE UNITED STATES

[No. 44837. Decided December 1, 1941]

## On the Proofs

Geormisma contract; source made extinous absorbising for bids; and of manufactor including propriorisis peri old excellent and of manufactor including propriorisis peri of excellent contracts. The propriorisis are contracted as a substantial contract to the contract and delivery of ariganizes of a certain tope developed at its own suppose by plaintiff; and where plaintiff dis numberator and was paid blacterly, except, however, for a delocation with hold by the Compression General properties to reduce the priori and surprises to the smalled circle course it how each of and all substantial contracts and the contract of the contract

Benney, indefinition of proof. "There is plaintful in developing a new type of simplesse did not set up on its hoofs adverlopment could, make the proof of the plaintful in development of the new type of a proposed of the proof of the plaintful in the proof of the plaintful in the proof of the plaintful in the proof of developing to plaintful for critic contracts for the particular profession of the plaintful in the proof of the plaintful in the proof of the plaintful in the plaintful in the proof of the plaintful in the plaintful in the proof of the plaintful in the plaintful i

Same, computation of development costs.—In computing development costs, where no record of such costs was kept, changes in conditions, including fluctuations in the cost of labor and material during the period of development, may be taken in account.

Some; fault of defendant; responsibility.—In a situation such as existed in the instant case, where confusion has been caused by the fault of the defendant, said defendant may not stand aloof and take no responsibility for assisting in resolving the difficulty.

The Reporter's statement of the case:

Mr. J. Edward Busroughs, Jr., for plaintiff. Messrs.
William Stanley and William D. Donnelly were of counsel.
Mr. Carl Eardley, with whom was Mr. Assistant Attorney
General Francis M. Shea, for the defendant.

The court made special findings of fact as follows:

 Plaintiff, Douglas Aircraft Company, Inc., is, and at all times hereinafter mentioned, was a corporation engaged in the manufacture and sale of airplanes and having its principal office and place of business in the city of Santa Monica, California.

2. In 1929 plaintiff concluded that there was a need for commercial amplitain ariphanes, and commenced manufacture of sirphanes of this type under shop order 200. Plainting of the property of the propert

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Reporter's Statement of the Case planes of a similar design, model, or size manufactured by plaintiff.

The experimental or development work in connection with the manufacture of these amphibians was largely completed

on shop orders 500, 760, and 925.1 3. On January 8, 1934, plaintiff by a written contract,

No. 34194, agreed to manufacture and sell six (6) of the Dolphin amphibians to the Navy Department for transport pervice

On January 15, 1935, plaintiff, by written contract No. 34223, agreed to manufacture and sell ten (10) of the Dolphin amphibian airplanes to the Navy Department for patrol and rescue service by the United States Coast Guard.

On May 2, 1934, plaintiff, by a written contract, TCG-22240, agreed to sell to the Navy Department ten (10) mechanical remote control loop and indicator assembly equipments.

Shop order 340 was assigned to the three above-mentioned contracts, which were a part of what is known as the "amphibian program."

4. Plaintiff performed these contracts in each particular. and in the case of contract TCG-99940 and 34194 received the stipulated amount, to wit, \$297,378,77 for contract 34194 and \$2,980 for contract TCG-22240. The contract price for the airplanes furnished under contract 34223 was \$446,932.69. of which plaintiff was paid \$357,252.15, leaving an unpaid balance of \$89,680.54 on this contract. This balance the Comptroller General refused to pay, on the ground that contracts 34194 and 34223 were invalid since they were executed without first advertising for bids. He ruled that plaintiff was only entitled to the reasonable value of the airplanes and parts furnished under these contracts, which he administratively determined to be cost plus 10 percent. Based upon data supplied by the Navy Department after

Shop order numbers in the Dangles plant run consecutively from I to 1,000, and then begin again at 1, so that subsequent reference to a shop order of a lower number in these findings foce not necessarily mean that it was feeterd prior to a shop order of a higher number

Benerter's Statement of the Case an investigation by it of plaintiff's records, he held the reasonable cost to be as follows:

Contract No.	Cost	Ten percent	Total
34194 34223	\$397, 124, 65 313, 289, 12	890,712.47 31,156.91	\$997, 837, 12 242, 418, 00
Total due			870, 955, 15

He did not include any amount for the cost of developing the Dolphin model of plane in his determination of reasonable value.

The Comptroller General held that plaintiff had been overpaid the sum of \$69.541.65 on contract No. 34194, and

\$14.884.12 on contract No. 34223, or a total of \$84.375.77. 5. The direct cost was in fact \$208,600.03 on contract No. 34194 and \$313,506.48 on contract No. 34223, a total direct cost of \$522,106.51, which plus 10% equals \$574,317.16, or

\$4,062.01 more than the Comptroller General's audit showed. The table below shows the contract prices, the amount paid and the ectual cost on each contract

Contract	Contract price	Amount	Cost plus 10%	between cost and payment
34294	\$297, 378, 77 446, 903, 69	\$297, 578. 77 357, 252. 15	\$229,460.03 344,887.13	\$87, 916, 76 12, 366, 05
		654, 630. 92	574, 927, 16	80, 313, 76

6. Plaintiff and the Government subsequently entered into several other contracts (Nos. 31409, 46330, 47852, 48135, 48566, 50759 and 54163), each of which was fully performed by plaintiff.

The Comptroller General has withheld and is now withholding \$86,169.03 of the total contract price of these contracts because of the alleged overpayments on the prior contracts 34194 and 34223. In connection with this sum, however, the Comptroller General has tendered payment to plaintiff in the amount of \$1.793.26, which tender plaintiff has rejected (\$86,169,03 - \$1,793,26 = \$84,375,77. See Finding 4). That sum plus the difference of \$4,062.01 in direct costs equals \$5.855.27.

The sum of \$86,169.03, withheld as stated, is in addition to the sum of \$89,680.54 withheld in connection with the payment under contract 34223 (see Finding 4).

payment under contract 39223 (see Finding 4).

7. In connection with the design, manufacture, and marketing of any particular series or model of airplanes it has been the customary practice and procedure of plaintiff to construct the first airplane of such series largely by hand and to carry on the necessary experimentation, test flights and development work with the first blanes of the series.

As the design becomes perfected, certain jigs, dies, and other implements for multiple production are made. The manufacture of these instruments is known as "tooling." There is a transition period during the manufacture of the first few airplanes of the series, the work progressing during the period from hand production to quantity, or semi-mass production.

The cost of producing the first planes of a new model under this program is always high, the cost decreasing until a certain quantity production level is reached.

8. Plaintiff's books, records, and shop orders relating to the manufactor of airplanes reflect only actual costs of each order, it being plaintiff's policy until 1985 to absorb all development or experimental costs as they occurred, and plaintiff did not record or expressed in its books its development costs as such. The recorded costs on shop order 850 (the shap order which arcifed the Overname contracts in the order of the order of the contract of the observance orders as development or experimental costs.

9. In connection with the absorption of development costs in the Dolphin amphibian program or series, the average cost per plane, compared with the sales price per plane under the first three shop orders of this program, was as follows:

	planee of	Clost	Price
Bhap order 500	1 10	\$94, 199, 65 69, 532, 48 29, 081, 33	\$19,961.79 24,505.94 26,189.89

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gram, average costs and prices		were as i	ollows:
	Number of planes	Cost	Price
8hep order 170	9	\$35, 641, 16 25, 285, 82 36, 733, 80	\$30, 501. 38 33, 309. 83 In Inne

I Dafepdant's contracts

The average cost per plane of all planes produced under this latter group of shop orders was \$26,325.79.

The average price per plane of all planes constructed in the Dolphin amphibian program, with the exception of shop

order 340, was \$30,555.96. 10. On the assumption that no variables, such as cost of labor and cost of materials, exist between the two series of

shop orders tabulated in the preceding finding 9, and that the normal costs were the same in each series, the development cost of the Dolphin amphibian series is ascertainable from a comparison of these two groups of shop orders and is the amount by which costs under the first series exceeded those under the later, \$211,412.84. Sixteen fifty-ninths of this amount represented the proportion of planes manufactured for the defendant under the contracts in issue to the total number of Dolphin amphibians and is \$57,339,39. The amount of overhead applicable to this sum is \$2,409.92. making a total of \$59,749.94, or \$3,733.89 per plane.

 The figure of \$59,742,24, or \$3,733,89 per plane, as given in finding 10, does not accurately represent development costs because of a fluctuation in wages and the cost of alum-

inum during the Dolphin amphibian program. During the period 1929 to 1935, there was an increase in

the hourly wage rate in December 1933 and another increase either late in 1934 or early in 1935. There was during this period no substantial decrease in wages at any time,

The price of aluminum in January 1930 was \$24.30 per 100 pounds. In December 1934 the price was \$20,50 per 100 pounds. The weighted average price for aluminum during this period was \$21.86 per 100 pounds.

Opinion of the Court

The cost of all materials used in the first group of shop orders was \$179.016.47.

12. In connection with the Government contracts beroin involved and which were carried on shop order 340, certain changes were made in the tail structure or empenange of the Doughas amphibians at the instigation of defendant. The changes required by the Government related to the ruising of the control surfaces so that landing in rough water would not interfers with them.

13. Shop order 380 for nine (9) commercial planes was repressing through plantidity plantid concurrently with along order 504, and as the first sirplane under slop order 550 was often the plantidity plantidity plantidity plantidity order 550 was often redesigned or the redesigning overs on the empensage structure, which was primarily for the benefit of the defendant, was carried out on this plans, which was subjected to extensive experimentation and test flights. All the plants under along order mentation and defended only in mimor details, general construction and differed only in mimor details.

14. Plaintiff's books and records show the empennage design costs, including engineering and shop labor, to be as follows:

Ethop order	No. of Plane	Engineering	Shop labor	Total
340	16 9	\$25, 431, 88 23, 682, 78	\$133,607.52 111,007.71	\$1.00,009,40 155,000,48

The empennage costs pooled totaled \$294,059.89, and if each of the 25 airplanes is charged with an equal share of this cost, the cost of shop order 340 would be increased by \$27,782.50. Such an allocation and increase should be made.

15. The recorded cost of performing the contracts in issue

without including any development cost or allocating the empemage cost was \$522,106.51.

The court decided that the plaintiff was entitled to recover.

MADDEN, Judge, delivered the opinion of the court: Plaintiff in January 1934 made two contracts, one for six and the other for ten Dolphin amphibian airplanes to be

Opinion of the Court manufactured by it and sold to the defendant. The defendant did not advertise for bids as required by statute a before making these contracts. After the airplanes had been delivered to the defendant, and after all but \$89.680.54 of the contract price of \$744.311.46 had been paid to plaintiff, the failure to advertise was noticed. The defendant took the view that the contracts were void and that plaintiff was entitled only to a reasonable price for the planes. The Comptroller General on the basis of an investigation and audit of plaintiff's books and records concluded that the cost of their manufacture, which he determined to be \$518,-413.77, plus a profit of ten percent, making a total of \$570.255.15, was all that plaintiff should have received. This was \$174,056.31 less than the contract price, and \$84,-275.77 less than the amount already paid to plaintiff under the contracts. Plaintiff subsequently had other contracts with the defendant and the defendant withheld from its payments to plaintiff on these contracts the sum of \$86,-169.03, to compensate itself for its claimed overpayments on the Dolphin contracts. The Comptroller General later admitted that \$1,793.96 too much had been withheld and tendered that amount to plaintiff, who refused it. The cost was actually \$3,699.74 more than the amount shown in the audit, or \$522,106,51. Plaintiff's first contention is that it was entitled to the

full contract price, in spite of the fact that the defendant did not advertise for bids. On that basis plaintiff would recover \$178,849.97. We think that the fact that plaintiff study performed the contracts and that the defendant paid all of the agreed price on one of them, and a large part of it on the other, does not prevent the defendant from asserting the statutory requirement. Of Wisconsin Central Railroad Co. v. Dutact States, 164 U. S. 190.

Plaintiff contends, in the alternative, that if it may not recover the contract price as such, it is entitled to recover its costs incurred in the manufacture of the airplanes, plus a ten percent profit. The defendant concedes that principle. But the parties disagree as to what those costs were. The Comptroller General's audit allowed plaintiff the actual

<sup>\*</sup> United States Code, tit. 41, sec. 5.

direct costs of the labor and materials which went into the sixteen planes, plus ten percent for profit. Plaintiff, claims that the cost of these planes, properly computed, should include an appropriate part of the cost of develop-

ing the model of plane.

Only fifty-simp planes of the Dolphin model were manufactured by plaintiff. If developing a new model, the model of the plaintiff. If the plaintiff is the plaintiff of the plaintiff of the plaintiff. If the plaintiff is the plaintiff of the plaintiff of

Paintiff contends that the development cost of the model is the amount by which the costs of the early built units. Before costs leveled off to normal, exceeded the normal costs. It says that the defensions should bear its proportionate that the content of the cost of the cost of the cost of the ity got sixten of the fifty-nine planes of this male which plaintiff manufactured. Defendant does not day that development costs should properly be included, but asserts that plaintiff has not shown what they were with sufficient accuracy to easible the court to fir their sounds.

It is true that plaintiff, at the time it manufactured the planes in question had no systematic method of allocating certain costs and calling them, on the books, development costs. Its need for such figures in the present case results from the fault of agents of the government in not devertising for bids as the status required. Plaintiff should not be penalized for not setting up a system of bookkeeping to meet that contingency. We should not, therefore, dismins meet that contingency. We should not, therefore, dismins the proof is really so indefinite as to make as in disligant indurence timeoscipied. We think it is not so here.

Comparison of the costs of the first made units with those of the units made after normal production was reached would give us the development costs, if other conditions remained unchanged. The defendant says that other conditions did not remain unchanged. It points to the price of aluminum and of labor. As to labor, we find that the only material changes in wage rates between 1929, when the first plane of this model was begun, and 1935, when a normal level of costs had been reached, were increases in 1933 and 1934 or 1935. That change operates in favor of the defendant, since it keeps down the early cost, increases the later cost, and thus reduces the difference between them. which plaintiff claims as the development cost. The price of aluminum, however, did go down from \$24.30 per hundred pounds in January 1930 to \$20.50 in December 1984. That change would tend to make plaintiff's method of ascertaining development costs inaccurate. Plaintiff offers, in its brief, a method of eliminating this inaccuracy. Its suggestion is as follows: the \$24.30 cost of aluminum for the early made planes exceeded the weighted average cost of \$21.86 for aluminum used in planes manufactured after production became normal by approximately 10%; assume that the price of all materials used in the planes fell 10% between the time of making the first planes and the later ones; take 10% of the cost of all materials used in the early series, \$179,016.47; the result is \$17.901.65; deduct the \$17.901.65 from \$211.412.84, the amount of the development cost if fluctuations in prices were disregarded; this gives \$193,-511.19 as the corrected development costs: take 16/59 of that amount, or \$52,477.60, as the defendant's proportionate part: add overhead adjusted to this reduced figure in the amount of \$2,193.60, giving an adjusted figure for the defendant's share of the development costs of \$54,671.20.

We think this method of computation is acceptable, with one minor exception, in the absence of better available proof. It does not substantially prejudice the defendant unless the cost of some important material, other than

<sup>\*</sup>Our computation of the adjusted overhead is \$2,205.86: (\$2,409.82 \_\_17,801.85 \times 2,409.92) instead of \$2,198.60.

aluminum, fluctuated downward more than ten percent during the period here in question. We think that if that had occurred, the defendant would at least have raised the question as to that particular material. In a situation such as this, where the confusion has been caused by the fault of the defendant, we think it may not stand completely aloof and take no responsibility for assisting in resolving the difficulty.

During the course of shop order 340, which carried the defendant's contracts, the defendant requested certain changes in the tail structure, or empennage, of the Dolphin, to facilitate landing in rough water. Shop order 380, for nine commercial planes for another purchaser, was progressing through plaintiff's plant concurrently with shop order 340, and as the first plane in shop order 280 was in a more advanced stage of construction than any of the planes on shop order 340, the redesigning and experimental work on the empennage was largely carried out on it. The development cost was carried on that shop order and none of it was allocated to shop order 340. Plaintiff proposes to allocate that cost by adding the total empennage costs on the two shop orders and dividing by the number of planes so as to make each plane in the two shop orders hear an equal amount of that cost. Since all the planes under the two orders were substantially similar, we think that method of computation is permissible, under the circumstances of this case. The empennage costs on both shop orders totalled \$294.189.89. Allocating this amount proportionately to the number of planes in each group increases the cost of shop order 340 by \$27,782.50.

We conclude, therefore, that plaintiff should have been paid development costs in the amounts of \$84,683.68 and and \$87,783.00 in addition to the direct costs. It should have been paid a total of \$865,087.07 (costs plus 1995). It was paid \$865,680.90 on these contracts and the defendant is withholding from it on other contracts the sum of \$86,-115.00 and the state of the contracts and the sum of \$86,-II may therefore recover \$86,667.83.

It is so ordered

Jones, Judge; Weitlaber, Judge; Littleton, Judge; and Whaley, Chief Justice, concur.

151 Reporter's Statement of the Care

MORRISON CAFETERIAS CONSOLIDATED, INC., v. THE UNITED STATES

[No. 45018. Decided December 1, 1941]

On the Proofs

Capital stack tax: corneration not shown by evidence to be not encaped in business.--Where the plaintiff, a Louislana corporation, filed a capital stock tax return for the year ended June 20, 1934, reporting \$720,000 as the value of its entire capital stock and showing no tax liability and claiming exemption from the capital stock tax on the ground that it was a nononerating holding company not carrying on or doing any business during any part of the taxable year; and where plaintiff filed a similar return for the year 1835, reporting \$783.412.75 as the value of its entire capital stock and a tax liability of \$733, and claiming exemption likewise on the above-stated grounds; and where, on March 14, 1986, plaintiff filed its so-called "amended" capital stock tax return for the year 1934 reporting a nominal sum of one dollar as the value of its entire capital stock; and where there is no evidence in the record to show that the plaintiff was not engaged in carrying on or doing business during the years in question, which is the essential basis of the levy and assessment of the tax - It is held to be presumed that business was carried on by it and that it was accordingly subject to the Same: tox returns.-The documents filed by plaintiff on regulation

forms were either returns within the meaning of the law or were something not required by the law; there is no such classification as "so tax returns" or "exemption" returns. Bame; "first" return.—The so-called corrected or "amended" return, which was filled long after the due date of a return for

which was filed long after the due date of a return for either of the years in question, was not a "first" return within the meaning of the statutes.

The Reporter's statement of the case:

Mr. B. Bayard Strell for the plaintiff.

Mr. John A. Rees, with whom was Mr. Assistant Attorney General Samuel O. Clark, Jr., for the defendant. Messrs. Robert N. Anderson and Fred K. Dyar were on the brief.

The court made special findings of fact as follows, pursuant to the stipulation of the parties:

Plaintiff is now, and was at all times hereinafter mentioned, a domestic corporation duly organized and created

Reporter's Statement of the Case in June 1928 under and by virtue of the laws of the State of Louisiana, with its principal office and business address in the City of New Orleans, Louisiana.

2. On August 30, 1984, plaintiff filed with the Collector of Internal Revenue for the District of Louisians a capital stock tax return for the year ended June 30, 1984, reporting thereon \$7520.00 sate value of its entire capital stock and no tax due by reason of a claimed exemption. Plaintiff simultaneously filed a Tressury form 717 claiming exemption from any liability for capital stock tax upon its return of the stated reason that it was a nonoperating holding company not carrying on or doing any business during any part of the taxable year.

Parsuant to an extension granted by the Commissioner of Internal Revenue plaintiff timely filled on August 30, 1905, a capital stock tax return for the year ended June 30, 1905, reporting thereon \$783,11275 as the value of its entire capital stock and a tax liability of \$783. Simultaneously discretiffication from any liability for the capital scotch tax about compliants of the capital scotch tax about compliants of the capital scotch tax about tax about the capital scotch tax

Plaintiff filed with the Commissioner of Internal Revenue on March 14, 1936, its so-called "amended" capital stock tax return for the year 1934 reporting thereon a nominal sum of one dollar as the value of its entire capital stock.

business during any part of the taxable year.

3. Numerous conferences were held between representatives of the plaintiff and of the Commissioner of Internal Revenue which finally culminated in a denial by the Commissioner of plaintiff's claims for exemption from profits tax liability for the years ending June 30, 1934 and 1935.

Thereafter, the Commissioner of Internal Revenue timely made assessment of federal capital stock tax in the sum of \$750 with accruad interest thereon of \$100.07 and \$730 with accruad interest thereon of \$330.07 for the years 1938, and 1935, respectively. The aggregate amounts of \$890.07 and \$780.00 were paid by the plaintid upon statutory notice and demand to the Collector of Internal Revenue for its bistict on October 95 and December 3, 1936, respectively.

Orinian of the Court 4. Plaintiff filed separate formal claims for refund on June 28, 1937, of the sums paid as stated in the preceding paragraph. Each claim set forth as grounds a statement that the plaintiff was a holding corporation and as such it was not engaged in the carrying on or doing of business and further stated in substance that the Commissioner of Internal Revenue had wrongfully used the declared values of \$720,000 and \$733.412.75 for its capital stock as the base for computing the taxes which had been assessed and paid. As a part of this ground, it was further claimed that the Commissioner should have used a valuation of \$1 as set forth in the "corrected" or "amended" capital stock tax return filed March 14, 1936, for the year 1934. Plaintiff's claims for refund were formally disallowed and rejected in full by the Commissioner of Internal Revenue and plaintiff so advised by a registered letter dated December 13, 1937.

There is no evidence tending to show that the plaintiff was not, at the time involved, engaged in carrying on or doing any business.

The court decided that the plaintiff was not entitled to pecover

Green, Judge, delivered the opinion of the Court:

This suit is begun to recover \$1.606.87 plus interest. The principal sum is alleged to have been erroneously and illegally collected as capital stock tax for the taxable years ended June 30, 1934 and 1935. Claims for refund were duly filed stating (1) that plaintiff was exempt from tax as a holding corporation not engaged in carrying on or doing business during either of the years in suit, and (2) that the taxes in controversy were improperly computed upon the declared value reported by plaintiff in its return.

The defense is that the record facts do not support the

alleged cause of action. It seems to be conceded that the plaintiff is a domestic

corporation and during the fiscal years involved was a parent corporation of a group embracing eight other corporations operating cafeterias in the States of Alabama, Florida, Georgia, Louisiana, and Mississippi.

On August 20, 1904, plaintf filed a capital stock has return for the Acable year ended Jone 20, 1904, specifing return for the Acable year ended Jone 20, 1904, specifing return for the Acable year ended Jone 20, 1904, specific plaintful to take the present of a claimed exemption. Plaintiff simultaneously filed a formal claim for exemption from any liability for explaint stock tax upon its return for the stated reason that it was a nonperacting holding company not cause that it was a nonperacting holding company to the cashles one of the present the company of the compan

On August 30, 1985, plaintiff filed a capital stock tax return for the taxable year ended June 30, 1985, reporting thereon \$733,412.75 as the value of its entire capital stock and a tax liability of \$733. Simultaneously therewith, plaintiff filed a formal claim for exemption similar to that which it had filed for the preceding taxable year.

Plaintiff's returns filed on August 80, 1934, and August

30, 1935, as stated above, were timely filed within the statutory period as extended by the Commissioner of Internal Revenue.

On March 14, 1936, plaintiff filed with the Commissioner of Internal Revenue a so-called "amended" capital stock tax return for the year 1934, reporting thereon a nominal sum of \$1 as the value of its entire capital stock.

After conferences between representatives of the plaintiff and of the Commissioner of Internal Revenue, its claims for exemption were denied and timely assessments of Federal recommendation with the commissioner of Internal Internal Internal Internal Internal Internal 180,007 for the 190,007 for 190,007 f

respectively.

Plaintiff filed separate formal claims for refund on June 28, 1937, of the sums paid as stated in the preceding paragraph. Each claim set forth as grounds a statement that the tarpayer was a holding corporation and as such it was not engaged in the carrying on or doing of business and further stated in substance that the Commissioner of Jin.

ternal Revenue had wrongfully used the declared values of \$250,000 and \$753,412.75 for its equital stock as the base for computing the taxes which had been assessed and paid. As \$250,000 and \$753,412.75 for its equitation of \$2\$ as a set forth in the "corrected" or "amended" capital stock tax return field March 14, 1908, for the year 1908. Heintiff's claims for refund were formally disallowed and rejected in full by the Year a residenced liter of all the properties of the pro

The argument of plaintiff is based upon the assumption that the returns first filed for each of the years in suit won to taxable returns and refers to them as either "no tax" returns or "exemption" returns. It contends that the value of §1 declared in the "annedded" return is the proper basis for any calculation while its correct capital stock tax liability for both of the taxable years in suit.

An extension had been granted which made the returns filed August 30, 1934, and August 30, 1935, filed in time. The claims for refund also were timely filed and the suit was begun on December 12, 1939, which was within two years after December 13, 1937, which was the date of the Commissioner's rejection letter.

The plaintiff in argument says that the documents which plaintiff first filled for each of the years in suit were either "no tax" returns or "exemption" returns. There is no such classification in the law or any descriptive legal terms. The documents were either returns within the meaning of the law or were something not required by the law.

It seems to be conceived that both of the returns were repeared on the Treasury Department form 707 printed for the use of corporations required to make and file a return for 1934 the form as filed was completely filled out with the sole exception of lines 11 and 14 showing computation of the tax due. The decument filled ways 10, 1930, was fully complete even to the computation of the tax flushilly in the properties of the tax flushilly in the properties of the tax flushilly in the properties of the tax flushilly in the second properties of the second properties o

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render it no return whatever. Germantovon Trust Company
v. Commissioner. 309 U. S. 304, 310.

The so-called corrected or "amended" return filed March 14, 1936, was filed long after the due date of a return for either of the years in question and cannot be said to be "first" return within the meaning of the statutes. It was, therefore of no effect

The defendant's attorney asserts in argument that the claim of exemption has been shadoned, but we find nothing in the record to that effect although the plantiff in its every that we should determine this matter. Under familiar principles, the assessment made by the Commissioner is presumed to be valid and supported by the facts until the contrary is shown. There is no evidence whatever to show that the plantiff was not engaged in earrying or or doing that the plantiff was not engaged in earrying or or doing assessment of the tax, we must presume that business was in fact carried on by it and it was subject to the tax. The return made for the texable year ending June 30, 1934, was "first" recurry which under the statute is it then stood

It follows that plaintiff's petition must be dismissed and it is so ordered.

JONES, Judge; WHITAKER, Judge; LITTLETON, Judge; and WHALEY, Chief Justice, concur.

### WARNER U. HINES v. THE UNITED STATES

[No. 45028. Decided December 1, 1941]

On the Proofs

Pay and alloscances; effective date of retirement of Navy officer.— Following the decisions in Butter v. United States, 91 C. Cls. 83, and similar cause citched, it is held that the plaintlift, an officer in the Navy, was retired as of the date fixed in the order of the President and is accordingly entitled to recover. Reporter's Statement of the Case

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. King & King

were on the briefs. Mr. Elihu Schott, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant. Miss Stella

Akin was on the brief. The court made special findings of fact as follows:

1. June 7, 1919, plaintiff was commissioned an ensign in the United States Navy; was promoted to lieutenant, junior grade, June 7, 1922, and to lieutenant, June 7, 1925. He served continuously on active duty as a commissioned officer from June 7, 1919, to August 1, 1936.

2. April 24, 1936, pursuant to orders issued by the Secretary of the Navy, plaintiff appeared before a Naval Retiring Board, which determined that he was incapacitated for active service by reason of arterial hypertension, moderate enlargement of the heart, and chronic nephritis; that his incapacity was permanent and incident to the service

3. The proceedings and findings of the Naval Retiring Board were forwarded to the Secretary of the Navy, who transmitted them to the President May 26, 1936, with the recommendation that they be approved and that plaintiff be retired from active service on August 1, 1986, and placed on the retired list in conformity with the provisions of the United States Code, Title 34, Section 417. May 27, 1936, the President approved the findings of the Naval Retiring Board and the recommendation of the Secretary of the Navv.

4. June 8, 1936, the Chief of the Bureau of Navigation advised plaintiff as follows:

1. The Naval Retiring Board before which you appeared found you incapacitated for active service by reason of arterial hypertension, moderate enlargement of the heart, and chronic nephritis; that your incapacity is permanent, and is incident to the service.

. The President of the United States, under date of 27 May, 1936, approved the proceedings and findings of the Naval Retiring Board in your case, and on 1 August, Reporter's Statement of the Case
1936, you will, in accordance with his direction, regard
yourself as having been transferred to the retired list of
officers of the Navy from that date, in conformity with
provisions of U. S. Code, Title 34, Section 417.

The Bureau regrets that your disabilities have interrupted your career of active service.

Acknowledgment of receipt is requested.

5. Plaintiff completed IT years' service for pay purpose on June 7, 1906. He received active duty pay, based on 15 years' service, at the rate of \$8250 a month, from May 37 to June 5, 1906, inclusive, and at the rate of \$812.50 a month, based on 17 years' service, from June 7 to July 31, 1906, inclusive. The increased active duty pay received by Jun from June 7 to July 81, 1906, was deducted by the Comptroller June 30, 1908, on the ground that his retirement became effective May 27, 1908, the date on which the President approved the findings of the Naval Retiring Board, and not on August 1, 1908, the date on which, under the President's order, his retirement became effective order, his retirement became

Plaintiff received retired pay, based on 17 years' service, at the rate of \$234.85 a month, from August 1, 1936, to September 30, 1937, but the Comptroller General deducted from plaintiff's pay which acrued from April 1 to June 30, 1938, the difference between the amount received by him and \$187.50 a month, applicable to an officer of his rank retired after 15 vears' service.

During the period of this claim prior to August 1, 1986, plaintiff was paid rental allowance for three rooms and one subsistence allowance a day as an officer without dependents, which rates were applicable to plaintiff's rank after 15 or 17 years' services.

6. If it should be held the plaintiff is entitled to active duty pay and allowance based upon all service performed by him prior to August 1, 1938, the date of his transfer to the retired list, there would be due him for the period from May 27 to July 31, 1908, inclusive, the difference in active duty pay between \$\$312.50 a month, applicable to a linetamounth received by him as an officer of that rank with over 15 years' service, from June 7, 1936, to July 31, 1936, one

month and 24 days at \$82.50 a month, or \$11.20. If held entitled on and after August 1, 1206, to retirvel pay based on entitled to a differens in retired pay between sentitled to the differens in retired pay between \$824.37 s a month, applicable to a lieutenant, U. S. Nary, retired after 17 years' service, and \$8157.50, retired pay received by him as an officer of that rank after 15 years' service, from August 1, 1206, to Sperhenber 20, 1120 (the date of the latest available roll in the General Accounting Office), three years and two three the contract of the contract

The court decided that the plaintiff was entitled to recover.

Opinion per curiam: There is no dispute about the facts in this case as set forth in the special findings of fact.

Plaintiff is a naval officer who was found by a Naval Retiring Board to be incapacitated for active service. The Secretary of the Navy presented the findings to the Penident with the recommendation that they be approved and that plaintiff be retired from active service and placed on the retired list August 1, 1906. The Penident, on May 27, 1906, approved the findings of the Retiring Fourd and the The selection of the Penident of the Penident of the Naval The selection in this case is—on which of the two

dates above-mentioned was plaintiff actually retired.

The same question was decided by this court in the case of James A. Greenwald, Jr. v. United States, 88 C. Cls. 264; Charles G. Wadbrook v. United States, 90 C. Cls. 480; and Henry M. Butler v. United States, 91 C. Cls. 88.

In the Butter case, supray, the identical corier was considered and decided. The instant case is controlled by the decisions in those cases. Under the holdings of the cases outded, plaintiff was retired on August 1, 1986, the date on which the President directed he should be transferred to the retired list, and judgemen is readered for the plaintiff the retired list, and judgemen is rendered for the plaintiff entry of judgment will be suspended pending receipt of a report from the General Accounting Office of the amount

due plaintiff in accordance with this opinion,

It is so ordered.

#### Syllabus

# WILLIAM E. REYNOLDS v. THE UNITED STATES (No. 45058. Decided December 1, 1941)

#### [10. moor. Decining Decomber 1, 1941

### On the Proofs

Page and allowsnows; commendent of the Coast Guard placed on relieve Mair, Act of Jensony IZ, 1253—"Names plasmit after Coast Guard was pixed on the relieve between the Coast Guard was pixed on the relieve bit and the coast Guard with the rank and active day may of a vear substant (lower held), the rank and active day may of a vear substant (lower held), relieves the relieve bit of the coast of the coast of the relieves the rank and active day may of a vear substant, (lower held), relieves the rank and the coast of the page of the coast of the coast of the coast of the coast of the page of the coast of the coast of the coast of the coast of the page of the coast of the coast of the coast of the coast of the page of the coast of the page of the coast of the coast

Bame; conflicting provisions is some statute.—Where there are two provisions in the same statute relating to the same matter and the language of the two provisions gives rise to a doubt, such doubt will be resolved in favor of the later expression in the statute.

Some: speciel provision.—Section 3 of the Art of January 12, 1026, was a special provision and restate to a special cases of officers, which included plaintiff, potwithstanding plaintiff was serving as Commandant of the Count Cound at the time of his retirement, and notwithstanding that section 2 of said set was a general provision relating to the retirement of any officer while serving as Commandant, which section 1, except for the prevision of section 8, would have applied to any officer upon

Some; Act of June 8, 1887.—The Act of June 9, 1987, amending the first provise of section 2 of the Act of January 12, 1928, did not take away any rights granted to a retiring office of the Coast Guard by the Act of 1928, but only granted additional rights.

Guard by the Act of 1923, but only granted additional rights. Some, Act of June 85, 1886.—The Act of June 25, 1886, amending section 2 of the Act of January 12, 1923, left unmodified and undisturbed the provisions of section 3 of said 1923 Act.

Some; action 2, Act of June 9, 1837.—The amendment made by section 2 of the Act of June 9, 1987, to section 3 of the Act of January 12, 1823, did not take away anything that had been previously granted but simply granted additional rights to a retiring captain of the Const Guard.

Reporter's Statement of the Case

The Reporter's statement of the case:

Mr. Leo A. Rover for the plaintiff.

Miss Stella Akin, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant,

Plaintiff seeks to recover additional retired pay in the amount of \$1,500 per annum from January 1, 1934, a date six years prior to filing of the petition.

Plaintiff claims that under the act of January 12, 1928, 42 Stat. 1130, and other statutes relating to retirement of officers of the Coast Guard, he was and is entitled to retired pay based on the active-duty pay of one grade above that actually held by him at the time of his retirement. The Government refused to give him retired pay on that basis, and counsel for defendant insists that decision was correct.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff was born January 11, 1860. He enrolled as a cadet in the United States Revenue-Marine Service, later changed to the United States Revenue-Cutter Service, and, in 1915, to the United States Coast Guard. June 17, 1880, he was commissioned a third lieutenant in the service

Plaintiff was on active continuous service as a member of the Coast Guard from May 22, 1878, to January 11, 1924, a period of about 45 years, 7 months, and 17 days. He was on active continuous service as a commissioned officer in the Coast Guard from June 17, 1880, to January 11, 1924, a period

of 43 years, 6 months, and 24 days. 2. Plaintiff was successively promoted through the various

grades in the service from third lieutenant to commandant. He was on active duty at various stations in the Coast Guard, including service in the Bering Sea, the Arctic Ocean, and in Alaskan Waters: and was also on the Jeannette Relief Expedition-Arctic in 1881 and served with the Navy throughout the Spanish-American War in 1898 and the World War in 1017\_1001

Plaintiff was placed on the retired list of the Coast Guard January 11, 1824, at which time and prior thereto he was Commandant of the Coast Guard with the rank and activeduty pay of a rear admiral (lower half) of the Navy, and prior to his retirement he had received various commissions of appointment to that position from the President.

September 22, 1919, plaintiff was duly appointed by the President "Captain Commandant of the Coast Guard of the

United States to rank as such from the date of oath. This commission to continue in force during the term of four years." The date of the oath was October 2, 1919.

December 19, 1919, the President issued plaintiff the fol-

lowing commission:

Reposing special trust and confidence in the patriotism, valor, integrity, and abilities of William Edward Reynolds, Captain Commandant, U. S. Coast Goard, I have nominated, and by and with the advice and consent of the Senate do appoint him to have temporarily the rank of Commodore in the Navy and Brigadier General in the Army in the Coast Guard of the United States,

to rank as such from the second day of October, 1919.

This commission to continue in force during the pleasure of the President of the United States for the time being.

January 17, 1983, the President issued a commission of appointment to planistiff "to the rank of Rear Admirst during the remainder of his term of office as Commandant in the Coast Guard of the United States, under his existing appointment thereto, to rank as such from the twelfth day of January, 1982. This commission to continue in force during the pleasure of the President of the United States for the time being."

September 17, 1923, the President issued a commission to plaintiff in which plaintiff was appointed "Commandant with the rank of Rear Admiral, in the Coast Guard of the United States, to rank as such from the second day of October, 1923."

January 4, 1924, the President issued to plaintiff a commission appointing him "Commandant, with the rank of Rear Admiral, in the Coast Guard of the United States, to rank as such from the second day of October, 1923. This commission to continue in force during the pleasure of the President of the United States for the time being."

3. Plaintiff, while on active service as commandant in the United States Coast Guard, prior to and on January 11, 1994, drew the pay of a rear admiral (lower half) of the Navy—namely, 88,000 per anum. Upon his retirement January II, 1994, after having served more than forty years, and since that time he was allowed and has received the retired pay of only 75 per contum of his active-duty pay of \$8,000, or

\$4,500 per annum.

The pay of either a rear admiral (upper half) or a vice admiral of the Navy on active duty was at the time plaintiff was retired and has ever since been \$3,000 per annum, and

the retirement pay of either official is \$8,000 per annum. If at the time of his retirement plaintiff was entitled under the Act of January 12, 1923, 42 Stat. 1130, and other relevant statutes, to the retired pay of one grade above that held by him at the time of retirement, he was entitled to receive and is here entitled to recover additional retired pay of \$1,500 per annum.

4. January 11, 1924, plaintiff reached the statutory retirement age of 64 years and on that date the Secretary of the Treasury, with the approval of the President, transferred plaintiff to the retired list of officers of the Coast Guard. The Secretary of the Treasury advised plaintiff that on and after that date he would have the rank of commandant of the Coast Guard and the retired pay of rear admiral (lower half) of the Navy on the retired list. Plaintiff applied to the Secretary of the Treasury for an increase in his retired nay on the basis of one rank and grade above that held by him at the time of his retirement, to wit \$1,500 per annum. on the ground that he had served continually for more than forty years and was therefore entitled to such retired pay under section 3 of the Act of January 12, 1923. This application was refused by the Secretary of the Treasury on an opinion rendered by the Comptroller General against

plaintiff's claim.

### Opinion of the Court Littleton, Judge, delivered the opinion of the court:

The court decided that the plaintiff was entitled to recover.

Plaintiff claims that under section 3 of the Act of January 12, 1923, 42 Stat. 1130, when that section is interpreted in the light of the entire act and in the light of other relevant statutes, he was and is entitled to additional retired nay of \$1,500 per annum inasmuch as that section provided that when a commissioned officer of the Coast Guard who has had forty years' service shall retire he shall be placed on the retired list with the rank and retired pay of one grade above that actually held by him at the time of retirement. Plaintiff insists that this was a special provision for the benefit of all commissioned officers of the Coast Guard who had long service and is consistent with the provisions in section 2 of the same act, upon which the defendant relies, which relate generally, and without reference to length of service, to the retired rank and nav of a commandant of the Coast Guard.

On the other hand counsel for defendant insists that section 2 of the Act of January 12, 1923, suppa, was a special provision governing the rank and retired pay of any commissioned officer of the Coast Guard, including one who had more than forty years' service who, at the time of retirement, held a commission and was serving as commandant of the Coast Guard, having the rank and receiving the active-duty nay of a rear admiral (lower half) of the Nayy. And it is argued by defendant that section 3 was a general provision relating to all commissioned officers other than commandant who had more than forty years' service prior to retiring.

The parties are not in disagreement with reference to the well-established rule relating to the interpretation of the statutes, as stated in Rodoers v. United States, 185 U. S. 83. that " \* \* where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special-the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are Opinion of the Court manifestly inconsistent with those of the special." And also as stated in Mutual Life Insurance Company v. Hill, 198 U. S. 551, 558, in which the court said:

\*. The ordinary rule in respect to the construction of contracts is this; that where there are two clauses in any respect conflicting, that which is specially directed to a particular matter controls in respect thereto over one which is general in its terms, although within its general terms the particular may be included. Because when the parties express themselves in reference to a particular matter the attention is directed to that, and it must be assumed that it expresses their intent, whereas a reference to some general matter, within which the particular may be included, does not necessarily indicate that the parties had the particular matter in thought. \* \* \* The special controlled the general; that which must have been in the minds of the contracting parties controls that which may not have been, although included within the language of the latter stipulation. This is the general rule in the construction of all documents-contracts as well as statutes.

It is also the rule of statutory interpretation that where there are two provisions in the same statute relating to the same matter and the language of the two sections or provitions given itse to a doubt, or is in any way conflicting, the statute for the reason that it must be presumed that the Conress had the earlier provision in mind when writing the later provision and would, if it had intended that the earlier provision that the exception to the latter con, have inserted an

We are of opinion, as we shall hereinafter attempt to show, that section 3 of the Act of January 13, 1928, appra, was a special provision and related to a special class of officers and the special class of the special part commondant at the time of his retirement, and that section 3 of the act was a general provision relating to the extrement of any officer while serving as commandant, which, except for the provisions of section 3, would have applied to any officer upon reaching 64 years of age whether he had A rather detailed statement with reference to the provisions of sections 1, 2, and 3 of the Act of January 12, 1923, is necessary to a clear understanding of the question prosented. The Act of January 12, 1923, supra, was entitled "An Act To distribute the commissioned line and engineer officers of the Coast Guard in grades, and for other purcoses."

Section 1 provided that the number of permanent commissioned line officers of the Coast Guard authorized by law should be distributed in grades of one commandant, seven captains, twelve commanders, thirty-five lieutenant commanders, thirty-seven lieutenants, and seventy-seven lieutenants (junior grade) and ensigns; that the number of permanent commissioned engineer officers authorized by law should be distributed in grades of one engineer in chief, three captains (engineering), six commanders (engineering), twelve lieutenant commanders (engineering), twenty-two lieutenants (engineering), and forty-two lieutenants (junior grade) (engineering) and susigns (engineering); that promotions to the grades created by that act, namely, captain, captain (engineering), and commander (engineering) should be made from the next lower grade by seniority. Then followed a provise that lieutenants and lieutenants (junior grade). both line and engineering, might be promoted, subject to examination as provided by law, without regard to the number or length of service in grade, to such grades in the Coast Guard not above lieutenant commander or lieutenant commander (engineering) as correspond to the permanent ranks and grades that may be attained in accordance with law by line officers of the Regular Navy of the same length of total commissioned service, and officers thus promoted should be extra numbers in their respective grades, which extra numbers should not at any one time exceed twenty lieutenant commanders, fifteen lieutenants, fifteen lieutenant commanders (engineering) and eight lieutenants (engineering), but that no officer should be promoted under this proviso who would thereby be advanced in rank ahead of an officer in the same grade and corps whose name stood above his on the official precedence list. There was a further proviso that captains and captains (engineering) should have the rank of, and be of corresponding grade to, captains in the Navy, and comOpinion of the Court
manders (engineering) should have the rank of, and be of
the corresponding grade to commanders in the Navy.

the corresponding grade to, commanders in the Navy.

Section 2 upon which defendant relies, is quoted in full:

That the title of captain commandant in the Coast Guard is hereby changed to commandant. Hereafter the commandant shall be selected from the active list of line officers not below the grade of commander and shall have, while serving as commandant, the rank, pay, and allowances of a rear admiral (lower half) of the Navy: Provided. That any officer who shall hereafter serve as commandant shall, when retired, be retired with the rank of commandant and with the pay of a rear admiral (lower half) of the Navy on the retired list, and that an officer whose term of service as commandant has expired may be appointed a captain and shall be an additional number in that grade; but if not so appointed, he shall take the place on the lineal list in the grade that he would have attained had he not served as commandant and be an additional number in such grade: Provided further, That the engineer in chief, while so serving, shall have the rank, pay, and allowances of a captain (engineering) in the Coast Guard, and hereafter the engineer in chief shall be selected from the active list of engineer officers not below the grade of lieutenant commander (engineering); And provided further, That an officer who shall hereafter serve as engineer in chief shall, when retired. be retired with the rank of engineer in chief and with the pay of a captain (engineering) on the retired list, and that an officer whose term of service as engineer in chief has expired may be appointed a commander (engineering) and shall be an additional number in that grade; but if not so appointed, he shall take the place on the lineal list in the grade that he would have attained had he not served as engineer in chief and be an additional number in such grade: And provided further, That a constructor, after ten years' commissioned service in the Revenue-Cutter Service and Coast Guard, shall have the rank, pay, and allowances of a lieutenant commander, and after twenty years' commissioned service the rank. pay, and allowances of a commander.

A study of section 2 shows that in it Congress was dealing generally with two of the highest commissioned positions in the Coast Guard—to wit, commandant and engineer in chief—and the promotion to the position of commandant of a captain or a commander with the rank and active-duty pay and allowances, while so serving, of a rear admiral (lower half) of the Navy. The Congress was further dealing generally with the retired rank and pay of any officer without researd to length of service who should thereafter serve as commandant of the Coast Guard. It seems clear that no thought was being given in this section to any right or privilege of commissioned officers to additional rank and compensation by reason of length of service upon retirement while so serving as commandant or engineer in chief. In this connection it should be noted that the first proviso of section 2 dealt not only with the retired rank and pay of any officer serving as commandant and retiring while so serving, but it also dealt with the rank and grade to which such officer should be appointed upon expiration of his service as commandant. The second proviso of section 2 related to the engineer in chief who, while so serving, was to have the rank, pay, and allowances of a captain (engineering) in the Coast Guard. and, like the first portion of section 2 preceding the first proviso, it was provided that such engineer in chief should be selected from the active engineer officers holding the rank and grade of commander or lieutenant commander (engineering), which was one or two ranks and grades, respectively, below that of captain. The third proviso, relating to any officer serving as engineer in chief, required, in conformity with what had been provided with reference to the commandant, that such officer be retired with the rank of engineer in chief and with the pay of a captain on the retired list. This third provise likewise specified that if an officer promoted to engineer in chief did not become eligible for retirement until after the termination of his term of service as such engineer in chief, he should be appointed a commander, which was the next lower grade, notwithstanding he may have been a lieutenant commander at the time of his appointment as engineer in chief.

Section 4 of the existing law, Act of April 12, 1902, 32 Stat. 100, provided that "when any officer in the Revenue Cutter Service (changed in 1915 to Coast Guard) has reached the age of sixty-four years he shall be retired by the President from active service.

From what has been said, it is plain that section 2 was a general rather than a special provision applying in general terms to the appointment of any officer of the grades mentioned to the positions of commandant and engineer in chief, and to the retirement and the retired rank and pay of such offseen while bolding such positions upon reaching the age of sixty-four years, regardless of the number of years they had the such as the such as the such as the such as the such with reference to retired raths and pay by reasons of length of service, it is obvious that under the provisions of section plaintful would have received only the retired pay of a rear admiral (lower half) of the Navy, which was threefourths of \$8,000.

A study of the language of section 2 further convinces us that the first proviso of the section relating to the retirement of a commandant was intended primarily and wholly to prevent an officer upon reaching the age of 64 and while serving as commandant from being retired in the rank and grade in which he was serving at the time of his promotion to commandant and to remove any doubt that might arise in that connection because of the statement immediately preceding the proviso that the commandant should be selected from the active list of captains or commanders "and shall, while so serving as commandant, have the rank, pay and allowances of a rear admiral (lower half) of the Navy." [Italics ours.] In view of this language, an officer reaching the compulsory retirement age of sixty-four while serving as commandant might not have been entitled to three-fourths of the pay of a rear admiral (lower half) since after retirement he would not be "serving as commandant." To remove all doubt as to this and to fix the rank and grade of an officer whose term of service as commandant ended before he reached the age of retirement, the first proviso of section 2 was inserted. The third proviso had the same purpose and did the same with reference to the engineer in chief. Cf. Remoy v. United States, 33 C. Cls. 218. These provisos did not, therefore, preclude such commissioned officers from receiving the full benefit of any subsequent special provision in the act based on length of service to which they might be entitled.

Section 3 of the Act of January 12, 1923, supra, provided in full as follows:

That hereafter no commissioned officer of the Coast Guard shall be promoted to a higher grade or rank on the active list, except to commandant or to engineer in chief, until his mental, moral, and professional fitness to perform all the duties of such higher grade or rank have been established to the satisfaction of a board of examining officers appointed by the President, and until he has been examined by a board of medical officers and pronounced physically qualified to perform all the duties of such higher grade or rank: Provided. That if any commissioned officer shall fail in his physical examination for promotion and be found incanacitated for service by reason of physical disability contracted in the line of duty, he shall be retired with the rank to which his senjority entitled him to be promoted: Provided further. That hereafter when a commissioned officer of the Coast Guard who has had forty years' service shall retire, he shall be placed on the retired list with the rank and retired pay of one grade above that actually held by him at the time of retirement; and, in the case of a captain, the rank and retired pay of one grade above shall be the rank of commodors and the pay of a commodors in the Navy on the retired list. (Italics ours.)

It should be noted that the commandant and the engineer in chief are specifically mentioned in this section. First, this section deals with the matter of examination for promotion of all commissioned officers of the Coast Guard to a higher grade or rank on the active list, except to the commandant or to the engineer in chief; second, to the matter of promotion on the active list for retirement purposes of any commissioned officer found incapacitated for service by reason of physical disability contracted in line of duty; and third, and finally, to the unqualified right of any commissioned officer of the Coast Guard who has had forty years' service to be placed on the retired list with the rank and retired pay of one grade above that actually held by him at the time of retirement. The retirement right granted by section 3, both as to grade and pay based on length of service, is a special provision carved out of the entire act and relates only to a special class of commissioned officers of the Coast Guard, whether or not, at the time of retirement, they are serving as commandant or engineer

Oninian of the Court in chief. There is no basis for argument that there is any exception in section 3 which would exclude from its benefits an officer who has had more than forty years' service merely because he was holding a commission and was serving at the time of his retirement as commandant with the rank and active-duty pay of a rear admiral (lower half) of the Navy. or as engineer in chief with the rank and active-duty nav of a captain in the Coast Guard. We cannot engraft upon the plain language of section 3 an exception which would mate. rially change its meaning and purpose, as plainly disclosed by the language used. Leys v. United States, 80 C. Cls. 235, 239. The provision is mandatory and leaves nothing to be determined, except whether or not the officer being retired has had forty years' service. The right given by section 3 to those commissioned officers who had served forty years at the time of retirement was remedial and plainly in addition to the rights expressly granted by section 2 to officers who might be appointed and serve as commandant or engineer in chief. It should be liberally interpreted and applied. United States v. Landram, 118 U. S. 81, 85; American Tobacco Co. v. Werckmeister, 207 U. S. 284; United States v. Colorado Anthracite Co., 225 U. S. 219, 223; Delaney v. United States. 81 C Clo 44 61-164 TLS 989

In the first part of section 3 Congress excepted from examinstion a captain or a commander being promoted to commandant, or a commander or a lieutenant commander being promoted to engineer in chief, and we think it is clear that if Congress had intended to except these officers from the rights and privileges expressly given in the provision which immediately followed it would have used language to express that purpose sufficiently clear so as not to be misunderstood. See Act of June 29, 1906, 34 Stat. 553, 554. Moreover the last clause of the second proviso of section 3 expressly supports our interpretation. That clause provided that " \* \* \* in the case of a captain [the engineer in chief was a captain]. the rank and retired pay of one grade above shall be the rank of commodore and the pay of a commodore in the Navy on the retired list." This was later changed, as will bereinafter appear, and a captain was retired as a rear admiral (lower half). Under the quoted provision it is obvious that an engineer in chief who held the rank of captain and received the active-duty pay of a captain, would, if he retired while so serving as chief engineer, receive the rank and pay of a commodors of the Navy on the retired list which, for retirement purposes, was one rank and grade in pay above that of captain in the Navy.

Why did Congress insert this clause in the second provise of section 31 Why was a captain specifically mentioned and the commandant holding the rank and receiving active-duty the commandant holding the rank and receiving active-duty the answers to these questions are plain and, when given, show that Congress had in mind and intended that any commissioned officer of the Coast Gurud, including those officers serving as commandant and engineer in chief, should not be considered to the control of the control of the ment, they had forty years' service to their credit.

The answer to the first question is that Congress inserted the clause in the second provise of section 3 because the next rank above captain on the active list in the Nary was the control of the contro

as to why a captain in the Coast Guard was specifically mentioned in the second provise of Section 5, is that inasmuch tioned in the second provise of Section 5, is that inasmuch as captains in the Coast Guard, both of line and engineing, who had the rank and were of corresponding grade to captains in the Navy would not come within the provisions of existing law swetting a captain in the Navy to be retirred with the rank and pay of a commodore on the retired list it. Opinion of the Court
commodore in the Navy on the retired list applicable to a
captain in the Coast Guard.

Section 9, Act of March 3, 1899, 30 Stat. 1004, relating to retirement of officers in the Navy, provided in the last provision of this section shall be retired with the rank and three-fourths the section shall be retired with the rank and three-fourths the sea pay of the next higher grade, including the grade of commodore, which is retained on the retired list for this numroes.<sup>19</sup>

Other statutes relating to the Navy only and to the right of certain naval officers to be retired with the rank of commodere on the retired list of the Navy and those statutes retaining to the Navy which provide for the retirement of a rank and retired pay of a rear admiral (lower half) of the Navy need not be referred to I. I. is sufficient to say that it seems clear that Congress considered these statutes when inserting the last clause of the second provise of section 3 of the Act of January 12, 1923. A further reason was given the House of Representatives in House Report No. 934, which accompanied the bill which became the Act of January 12, 1929, as follows:

Having in mind the limitation in opportunity for advancement, as compared with that existing in the Army, Navy, and Marine Corps, that will exist in the Coast Guard ocen under the terms of this bill, it is thought that a commissioned officer, who has served his country faithfully for 40 years should, when retried, have the privilege of retiring in the next higher grade. The grade next above captain in the Coast Guard will

be, under the terms of this bill, that of commandant. A captain of over forty years' service, but who has never in fact served as commandant, should not have on the retired list the title of commandant; here, such an officer, under the language in section 5, would have the rank of commodere. Zhe pay of a commoder in the admired (lower half) on the retired list. (Italies ours).

When enacting the second proviso of section 3 we think it is clear that Congress was thinking of and intending to make provision for retirement of the engineer in chief holding the rank and receiving the pay of a captain on the active list, and the commandant holding the rank and receiving the pay on the active list of a rear admiral (lower half) with the rank and retired pay of one grade above that held by them at time of ratifement.

The answer to the second part of the question stated above, as to why the commandant holding the rank and receiving the active-duty pay of a rear solurial (lower half) in the Coast (Gardy was not mentioned), that the vas not necessary for members because the rank and retired pay of one grade above ment because the rank and retired pay of one grade above that held by him, if he was retired while holding a commission as commandant, was that of vice admiral, an existing rank on the active list of the Navy with the active-duty pay of a rear grade of the commandant of

We have considered the committee reports and legislative history of the Act of June 12, 1923, upon which counsel for defendant places some reliance in the argument that the first proviso of section 2 of the act specifically governs in this case over the provisions in the second proviso of section 3, but we find nothing in that legislative history which conflicts in any way with our interpretations of sections 2 and 3. On the contrary, we think the committee reports support the views hereinbefore expressed. Counsel for defendant refers to certain statements made on the floor of the Senate, pp. 150and 161 of the Congressional Record, 67th Congress, 4th session, but the statements to which reference is made relate only to section 2 of the Act and not in any way to section 3. Our interpretation of section 2 is in conformity with what was said about that section. The committee reports and the discussion on the floor of Congress show that Congress considered section 2 of the Act to be a general section relating to all commissioned officers, regardless of length of service, who might from time to time serve as commandant or engineer in chief; and that section 8 was a separate and special provision for the sole benefit of those commissioned officers who at the time of retirement had forty years' service. The

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commandant and the engineer in chief were clearly in this
class if they had served forty years.

Coursel for defendant further argues that any possible doubt as to whether section 2 of the Act of January 12, 1928, supra, controls plaintiff a case was removed by the Act of January 12, 1928, supra, controls plaintiff a case was removed by the Act of June 9, 1937, susceptible properties of section 2 of the Act of 1920 to a control of the Act of 1920 to a contring officer of the Coast Guard, but only granted additional rights. A study of the Act of 1937 to show that the intent and purpose of the original act with reference to the intent and purpose of the original act with reference to the service and of officers having forty years or more of service and of officers having forty years or more of service maniform demanding descept for the additional rights granted

by the amendments. Before discussing the provisions of the Amendatory Act of June 9, 1937, 50 Stat. 252, reference should be made to the Act of June 25, 1986, 49 Stat, 1924, which first amended section 2 of the Act of January 12, 1923, by striking out the first proviso in that section and inserting the following proviso in lieu thereof. "Provided. That any officer who was serving on June 1, 1936, or shall thereafter serve as commandant in the Coast Guard shall when retired (whether before or after the date of the enactment of this Act), be retired with the rank of Commandant and with the nay of a rear admiral (upper half) of the Navy on the retired list and that an officer whose term of service as Commandant has expired may be appointed a captain and shall be an additional number in that grade, but, if not so appointed, he shall take the place on the lineal list in the grade that he would have attained had he not served as Commandant and be an additional number in such grade."

This Amendatory Act left tumodified and undisturbed the provisions of section 3 of the original act of January 19, 1923, and if the first proviso of section 2 of the original act had act act and a standard provision and the first provision of section 2 of the original act had earlier and the first provision that plaintiff is correct in his claim, would be the same. The provision seamended still remained a general provision relating to the retirement of any officer who was serving as commandant of the Coast Guard on June who was serving as commandant of the Coast Guard on June

1, 1936, or who should thereafter serve as commandant. But this amended proviso must, like the original proviso, be read and interpreted in connection and consistently with other provisions of the statute contained in section 3 under the well-established rule that one part of the statute should not be lifted from its context and interpreted and applied separate and apart from the statute as a whole. The Amendatory Act of 1936 served only to grant additional retirement benefits. It did not take away any rights of retirement that had been granted under the original act of 1923. Under the Amendatory Act, an officer who retired while serving as commandant and who had, at that time, forty years' service to his credit was still entitled to the benefits of the second proviso of section 3 of the original act. The only change made by the Amendatory Act of 1936 in the original proviso of section 2 of the 1923 Act was to give an officer who had less than forty years' service at the time of his retirement. while serving as commandant the retired pay of a rear admiral (upper half) of the Navy on the retired list. The only effect of this change upon the original act as a whole was to give a retiring commandant who did not have forty years' service, and who would not come under the provisions of section 3, the retired pay of one grade above the grade of pay being received by him at the time of retirement, but he was to retain the rank of commandant on the retired list. In substance, therefore, insofar as retired pay was concerned, so long as the pay of a rear admiral (upper half) and a vice admiral remained the same, the 1936 Act operated to give all officers retiring while serving as commandant the same retired pay whether they had, at the time of retirement, served forty years or not.

The Act of June 9, 1987, supra, referred to by counsel for defendant, provided in section 1 that section 2 of the Act of January 12, 1983, as amended by the Act of June 25, 1986, supra, be amended by striking out the first provise of that section and inserting in lieu thereof the following:

Provided, That any officer who has served or shall hereafter serve as commandant, if heretofore or hereafter retired, whether before or at any time after the termination of his service as commandant, shall, if receiving the pay

### Opinion of the Court

of a rear admiral (upper half) at the termination of his service as commandant, be placed on the extred list with extremely an extremely according to the extred list with or, if receiving the pay of a rear admiral (lower half) at the termination of his service as commandant, shall be placed on the retired list with the rank and retired pay term of service as commandant has expired may be appointed a captain and shall be an additional number in that grade, but, if not so applicate, but all take the place had be not served as commandant and be an additional number in such as the service of the common of the comlance of the common of the common of the comlance of the common of the common of the comtant paragraphy. The observation of the comtant paragraphy and the common of the comtant paragraphy and the common of the comtant paragraphy. The common of the comtant paragraphy are the common of the comtant paragraphy and the comtant paragraphy an

Section 2 of this Act of June 9, 1987, provided that section 8 of the Act of January 12, 1923, as amended by the Act of February 28, 1997 (44 Stat. 1261), be amended by striking out so much of the second provise in that section as followed the semicolon and inserting in lieu thereof the following:

and, in the case of a captain, the rank and retired pay of one grade above shall be the rank and retired pay of a rear admiral (lower half). Any officer of the Coast Guard now having the rank of commodore on the retired list shall hereafter have in lieu thereof the rank of a rear admiral (lower half), without any increase in pay by reason of such change in rank.

The Amendatory Act of February 28, 1927, supra, referred to in the above-mentioned section 2 of the Act of June 9, 1937, was not a change in the substance of section 3 of the Act of January 12, 1932. The 1927 Act simply amended section 3 of the 1923 Act by an additional proviso that five designated retired commissioned officers of the Coast Guard "shall have the rank of commodors on the retired list withtural regions of this exc."

one thay measure my type tension to deep pleasing of trans are mental sections and above the reference to the numeramental section of the reference to the numerature of the reference of the reference of the numerature of the reference of the reference of the reference 1986, applies to the above-quoted amendment of section 2 by the Act of June 9, 1987. This 1987 amendment, as did the previous one, granted additional rights. It is no way too away or limited the reference benefits accruing under section 3 of the original set to a retiring commandant having forty wards express. A reading of the 1987 amendment of

Opinion of the Court section 2 shows that it remained a general provision and that its purpose and effect was to give an officer who had been appointed and thereafter served as commandant retired pay equal to three-fourths of the active-duty pay of a commandant, even though at the time of retirement at sixty-four years of age his term of service as commandant had expired and he had reverted to the rank and grade of a captain on the active list. In addition retired pay was granted to any officer who had theretofore served as commandant but whose service, as such, had terminated prior to retirement and who, because not having forty years' service at the time of retirement, was entitled under the original act only to the retired pay of a captain. In other words, the 1937 amendment of section 2 gave to any officer retiring with less than forty years' service who had served as commandant of the Coast Guard at any time since January 12, 1923, the retired pay based on the active-duty pay being received by him at the time of retirement if he was then serving as commandant, or increased retired pay over what he was entitled to under the 1923 Act and the 1936 amendment if he had been retired after his service as commandant had terminated.

The amendment made by section 2 of the Act of June 9. 1987, to section 3 of the Act of January 12, 1923, which was the first time the second proviso of section 3 of the original act had been changed, serves, in our opinion, to support our conclusion as to the right of all commissioned officers of the Coast Guard, including the commandant and the engineer in chief, to have the rank and receive the retired pay of one grade above that actually held by them at the time of retirement if at such time they had served forty years. The 1987 amendment of section 3 did not take away anything that had originally been given but it simply granted additional benefits of rank to a retiring captain of the Coast Guard by giving him the rank and retired pay of a rear admiral (lower half) of the Navy, if at the time of his retirement he had served forty years. Any such previously retired commissioned officer of the Coast Guard having the rank of commodore on the retired list was, by the amendment, given the rank of a rear admiral (lower half) on the retired list with179

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out any increase in pay by reason of such change in rank.

The retired pay of a commodore on the retired list and
that of a rear admiral (lower half) was the same.

Plaintiff is entitled to recover and judgment will be entered upon the filing by the parties of a computation showing the amount due.

Madden, Judge; Jones, Judge; and Whitakes, Judge, concur.

Whaley, Chief Justice, concurs in the result.

On March 2, 1942, upon a report from the General Accounting Office showing the amount due under the court's decision of December 1, 1941, supra, judgment was entered for the plaintiff in the sum of \$11,635.42.

### ROBERT E. KLOTZ v. THE UNITED STATES

On Defendant's Motion To Dismiss

Juristicition, petition held not to comply softs provisions of Thile 28, ection 282, U. S. Code-r. It is held that the allegations of plaintiff's petition, being vague and indefinite, and showing petition, being vague and indefinite, and showing the no promise of payment for information alleged to have been furnished to the Government, does not set out a cause of action under the provisions of the speeral juristicitional act (U. S. Code, Title 28, action 280) which gives the court jurisdiction to the real relative satisfies the Intel® State the Titled State the Titled State of the state of the provision of the set of the state of the set of

### Mr. Robert E. Klotz pro se.

Mr. J. F. Mothershead, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant.

The facts sufficiently appear from the opinion of the court.

Whaley, Chief Justice, delivered the opinion of the

This case comes to the court on the defendant's motion to dismiss, alleging that the petition does not set out a cause

<sup>\*</sup>Plaintiff's motion for leave to file amended petition allowed and amended petition filed Jamesry 14, 1942. Defendant's motion for leave to file motion to dismiss allowed and said motion filed March 7, 1942. Argued April 6, 1942, on defendant's motion to dismiss; no appearance for plaintiff.

Opinion of the Court of action against the defendant or any cause of action over which the court has jurisdiction.

An examination of the petition shows that the plaintiff alleges the suit is brought under the general jurisdictional act which gives this court the right to hear

All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable. U. S. Code, Title 28, Sec. 250.

The plaintiff must bring himself within the provisions of this section.

The petition then alleges:

That commencing November 21, 1939, and through December 14, 1940, he submitted to the Navy Department devices of a certain nature, and that said devices were rejected by the Navy Department for the reason that they considered the nature of the forces involved not of a sort to accomplish the purpose of the devices, and the Navy Department stated that the ides of devices of the same general nature had been considered for "at least the last twenty years" and had been rejected for the above reason; that, whereupon, the plaintiff undertook, by an exposition of his ideas on the subject, and by reference to the proper technological literature, to convince the Navy Department that devices of the general nature in question were feasible, and to explain to the Navy Department the physical principles of their operation; that plaintiff accomplished this, through an extended and controversial correspondence with the Navy Department; that beyond this he has by his own study made, and conveved to the Navy Department, discoveries of special and critical nature in regard to the forces in question, and these have included new and more correct and general formulations; that by reason of all of the above the Navy Department has been enabled to understand the operation of devices which it had not previously believed could function, and to confirm and accurstely estimate the military worth of devices it would great the term of the curst of the curs

This is a general, sweeping, cover-all allegation without any specific statement of what is the true nature of the claim. No allegation that any provision of the Constitution, or law of Congress, or regulation of an executive department has been disobeyed and no contract, express or implied, has been broken. No allegation is made that a patent of the plaintiff has been infringed by the Government or by some one performing work for the Government, and there is no claim for damages, liquidated, or unliquidated, not sounding in tort. When boiled down and freed from excessive verbiage the cause of action attempted to be set out against the defendant comes to the mere assertion that plaintiff has voluntarily furnished some information to the Navy Department in explanation of some vague, undefined "devices", not owned by the plaintiff, which he claims has proved of value. There is no allegation that the plaintiff was solicited for this information, or employed to make any study on behalf of the defendant on these devices but merely the contentious assertion that the plaintiff has explained the devices to the Navy in such a controversial way that the Department has been convinced against its will that these devices may be used in the manner and way that plaintiff contends. There is nothing to show that the "devices" are not the property of the Navy. Certainly no legal action is alleged and a petition for equitable relief must be reasonably definite and certain in its statement of a cause of action. Schierling v. United States, 23 C. Cls. 261

The allegations of the petition are too vague and indefinite to permit a comprehensive knowledge of what the suit is for. if not for compensation for general information furnished on certain devices, and we know of no law or regulation which permits recovery in such a case unless there has been a contract, express or implied. More is alleged.

The petition plainly shows no promise of payment for the alleged information. If the plaintiff has furnished something of value to the Navy, his redress is with the Concress.

Defendant's motion to dismiss is granted and the petition is dismissed. It is so ordered

Madden, Judge; Jones, Judge; Whitaker, Judge; and Lettleton, Judge, concur.

## BOLIVAR COTTON OIL COMPANY v. THE UNITED STATES

[Congressional No. 17484. Decided December 1, 1941]

On the Proofs

Contract for cotton linters; claim voluntarily transferred.-The instant case, referred to the Court of Claims by Senate Resolution, under which a number of cases, representing claims arising out of contracts made with cotton seed oil mills at the time of the World War, were so referred, presents facts similar to the facts in a number of such cases in which judgment has been rendered in favor of plaintiffs (See Hazelhurst Oil Mill & Fertilizer Co. v. United States, Congressional No. 17453, 70 C. Cls. 334; Farmers d Ginners Oil Co. v. United States, Congressional No. 17357, 78 C. Cls. 294) except that in the instant case plaintiff is not the original party with whom the United States made the contract upon which liability, if any, arises; and it is accordingly held that the voluntary transfer to plaintiff of the claim in question, growing out of the cancellation of said contract by defendant, comes within the provisions of Section 3477, Revised Statutes, and plaintiff is therefore not entitled to recover.

Some.—Where not entitled to recover.

Therefore the contract was made with another corporation, all of the property of which was sold to the plaintiff; and where upon such ask the plaintiff by such ask of contract to the plaintiff by such ask occupied no interest in the claim upon which plaintiff is entitled to bring suit assume the Culterel States.

Reporter's Statement of the Case

The Reporter's statement of the case:

Benet, Shand & McGorean for the plaintiff. Mr. George R. Shields was on the brief. Mr. Assistant Attorney General Francis M. Shea for the

defendant. Mosers. W. W. Scott and F. J. Keating were on the brief.

The court made special findings of fact as follows, upon the stipulation of the parties and the evidence adduced:

1. Senate Resolution 448 of March 3, 1963, referred to this court 285 claims which originated out of contracts made with the cottonseed-oil mills by the United States at the time of the World War. The contracts were terminated by the Government when the war ended but not in accordance with the terms thereof nor was any settlement ever offered to the mills under their provisions.

ever othered to the multi under their provisions.

The plaintiff is one of the claimants named in the Senate resolution but is not the party with which the United States made the contract, upon which liability, if any, arises. This contract was made with the Shelly Oil Company and plaintiff claims to be entitled to bring this sait by reason of the facts set forth in the following findings which are made nurraunt to the stitulation of the vartice.

2. Shelby Oil Company, a corporation organized under the laws of the State of Mississippi, was engaged in the manufacture of products derivative from cottonseed during the years 1918 and 1919.

No. May '26, 1890, Shally Oil Company ascented and delivered to Thomas G. Jordon, Trustee, a deed of trust for the use and benefit of Shally Citizens Bank & Trust Company, wherein Shelby Oil Company conveyed its real estate, buildings, machinery, and plant to the trustee to secure the payment of an indebteness of \$30,000.00 owing to Shelby Citizens Bank & Trust Company. The deed provided that in the assor of death in the payment of the provided that in the case of default in the payment of Shelby Citizens Bank & Trust Company, should sell the property at public action. On July 18, 1921, default in the payment of the indebtedness by Shelby Oil Company having occurred, the trustee, Thomas G. Jordon, at the request of Shelby Citizens Bank & Trust Company, sold the real estate, buildings, machinery, and plant of Shelby Oil Company at public aution to the highest bidder, Shelby Citizens Bank & Trust Company, for 830,000.00

On September 13, 1921, Shelby Citizens Bank & Trust Company, for the consideration of \$30,010.00, sold the real estate, including the buildings, machinery, and plant, formerly the property of Shelby Oil Company, to one H. L. Wilkinson.

On November 10, 1921, H. L. Wilkinson sold the abovementioned property to Bolivar Cotton Oll Company for the consideration of \$445,000.00 and the assumption by the latter of an indebedness of \$80,000.00 due Shelby Citizans Bank & Trust Company by H. L. Wilkinson. Bolivar Cotton Oil Company was organized in November 1921 as a corporation under the laws of the State of Tennesses. It was formed for the purpose of taking over and operating the control of the company of the company of the company for the company to the company of the company of the company of November 8, 1921, Shelby Oil Company, carine under

the authority of a resolution passed by its board of directors, sold all its personal property to Bolivar Cotton Oil Company for the consideration of the latter assuming an indebtedness of \$800,0000 owing by Shelby Oil Company to the Shelby Citizens Bank & Trust Company and an indebtedness of \$976.45 owing by Shelby Oil Company to divers persons, firms, and corporations. During the period August 1, 1918, to and including No-

During the period August 1, 1918, to and including November 8, 1921, the stockholders of Shelby Oil Company were:

> T. J. Poitevent Mrs. T. J. Poitevent Fred P. Shelby George B. Shelby Frank B. Havne

182

Beporter's Statement of the Case The stockholders of the Bolivar Cotton Oil Company wore .

H. L. Wilkinson L. B. Wilkinson

J. W. Wilkinson E. T. Lindsey

W. C. Manley

W. W. Denton

C. T. Jacobs Except as stated herein, neither the claim in suit, nor

any interest therein, has ever been transferred or assigned. 3. On or about September 5, 1918, effective, however, as of August 1, 1918, Shelby Oil Company entered into a contract with the DuPont American Industries, Inc., authorized and exclusive contracting agent for the United States for the sale of munition linters, known as "Seller's Contract of Sale No. 3184," by the terms of which it agreed to sell to the United States 1,600 bales (approximately 800,-000 pounds) of linters, all as provided by said contract, a copy of which is attached to the petition herein as Exhibit #7 and made a part hereof by reference.

4. During the period January 1 to July 31, 1919. Shelby Oil Company crushed a total of 1,058 tons of seed, which at \$6.77 per ton of seed crushed would amount to \$7,162.66.

5. Shelby Oil Company received on account of the linters produced from such seed the following amounts:

For linters sold to the United States

SS. 587, 19 Total receipts..... By reducing its cut of linters after January 1, 1919, Shelby Oil Company realized an additional hull production to the extent of 37.03 tons, which at \$13.50 per ton amounts

to \$499.91. For the convenience of the Court, the parties hereby join in the following as a correct statement of the account between Shelby Oil Company and the United States upon the basis of the foregoing facts and the application of the stipulation filed in Congressional No. 17341:

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	Credit	Items Allowable to Defer	edant	
		States		
regational num	credit.		410.11	

The court decided that the plaintiff was not entitled to recover.

General, Judga, delivered the opinion of the Court:
This case presents to the Court an action which is based
on a claim which is one of a number of similar claims
referred to this court by Senate Resolution 48t. The facts
in the case are similar to those in a number of each case
court and the plaintiff is not the original party with whom
the United States made the contract upon which liability,
if any, arises. This contract was made with the Shality,
of the property of which was sold to the
plaintiff, and upon this sale it rest its title and right to

It appears from the agreed statement of facts that in 1921 the Shelby (10 Company odd all of its personal propcety to the Bollvar Cotton Oil Company, plaintiff beerin, for the consideration of that company assuming certain for the consideration of that company assuming certain 707-68. The record does not show that the sale specifically included choose in action or claims in suit but if the plaintiff did not acquire title by virtue of this sale then there is nothing to show that it has any right whatever to the claim. The transfer was a voluntary one and as such is the claim of the company of the control of the control USGA 30%, which provides: Syllah

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and shall be absolutely null and void, unless they are freely made and executed in the presence of at least two sttesting witnesses, after the allowance of such a claim.

testing witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. \* \* \*

It has been held that this provision does not apply to cases where the transfer was made by operation of law through will, bankruptcy or insolvency, or otherwise but the transfer here made was purely voluntary and therefore absolutely mill and void under the statute. See United States v. Gillis, 98 U. S. 407; Spefford v. Kirk, 97 U. S. 484: National Bank of Olomerore v. Downie, 218 U. S. 345.

We are constrained to hold that the plaintiff acquired no interest in the claim upon which it can bring suit against the United States.

Plaintiff's petition is therefore dismissed and it is ordered

that the findings in the case be certified to Congress.

Madden, Judge; Jones, Judge; Lettleton, Judge; and
Whaler, Chief Justice, concur.

### SAM M. BRABSON v. THE UNITED STATES

[Departmental No. 175. Decided December 1, 1941]

On the Proofs

Property of Army officer disaspend during ablasment prum post in home under order of retirementy; 'in the suntiture previous,'"—When a commissioned efforce in the Barghar Army of the United States under papers of control of the Control of the Control of the such papers and directed to preceed to his home; and at his then post and directed to preceed to his home; and are present to the control of the control of the control are present to the control of the control of the control precept from and post to the thought and the control of the recover cause the previous and control of the first planting is settled to property were disamped; it is held that planting is settled to recover under the previous and control one of the first of all settled to the control of t

Same.—An officer acting under military orders is "in the military service" within the provisions of the Act of March 4, 1921.

Some.—In the instant case the plaintiff was traveling "under orders" and his property was being "transported by the proper agent

and his property was being "transported by the proper agent or agency of the United States Government." See Register v. The United States, 92 C. Cls. 487.

The facts sufficiently appear from the opinion of the court.

GREEN, Judge, delivered the opinion of the court:

Pursuant to section 148 of the Judicial Code, the Secretary of War transmitted to this court the claim of Major Sam M. Brabson for loss of private property, accompanied by photosiats of youchers, papers, documents, and proof pertaining thereto, duly certified by the Judge Advocate General

From these it appears that the claimant during the period inquestion had been since September 5, 1909, a commissioned officer in the Regular Army of the United States. On October 4, 1989, his retirement from active service for clinibility control of the control

home.

About October 24, 1938, Major Brabson's goods were delivered to the Quartermaster at Fort Lewis, Washington, for
packing, crating, and shipping. After being packed and
crated, on June 2, 1839, they were shipped by the Quartermaster at Fort Lewis to him at Orlando, Elpida, in compil-

ance with his request.

About August 20, 1939, the goods were received by Major

Brabon at Orlando, Florida, in a damaged condition. An

itemized statement of the damages and the estimated cost estimated cost of repairs is shown in the report of the War Department submitted to this court. The estimated cost of repairs was

\$1925.00. The shipment was not insured by Major Brabon.

It such that the sub
that the shipment was not insured by Major Brabon.

and received \$84.97 in stitlement thereof. On December 10, 1890, he submitted the instant claim in the amount of \$92.03. 1892, he submitted the instant claim in the amount of \$92.03. 1893, he submitted the instant claim in the amount of \$92.03. 1893, he says the permanent of the army regulations the claim was referred to a Board of Officers which found, among often things, that the damage was due to fault or negligence of the officer or employees of the Government, that the estimate of the cost or negative the damage (\$107.50) appeared to be just and reasonable; that the claims of the Act of March 4, the claims came within the previous or the Act of March 4, of \$92.03, being the amount chimnel, he amount received from terminal early content of \$92.03, being the amount chimnel, he amount received from terminal early claims.

The claim and accompanying papers were then transmitted to the Chief of Finance who referred them to a board of officers for consideration who found, among other things:

\* \* \* that the packing and crating were performed under proper authority; that the damage occurred incident to claimant's travel under competent change of station orders; \* \* \* \*

Taking into consideration that the weight of the shipment was in excess of the authorized allowanes and prorating the damage less the amount received from the railroad company, it found that the claim was one probable for payment under Act of March 4, 1021, and recommended that it be paid in the amount of the Government's pro rats share, so that the companion of the companion of the claim. The Chief of Finance transmitted the claim to the Ax-The Chief of Finance transmitted the claim to the Ax-

The Chief of Finance transmitted the claim to the Assistant Secretary of War recommending that it be approved for payment in the amount of \$47.20 but invited attention to though regulations permitted the transportation of each property at public expense, there was no authority under the act of March 4, 1921, for reimbursenent for loss, damage, or distruction thereof while being so transported; and to an opinion of the Judge Advocate General to the contrary. The Chief of Finance recommended further that the claim between the contrary of the contrary of the contrary. The Chief of Finance recommended further that the claim between the contrary of the contrary of the contrary. The Chief of Finance recommended further that the claim are opinion with a view to transmitting it to the Court of Chims as a dogaramental reference. The Judge Advocate General expressed the opinion that the claim came within the provisions of the act of March 4, 1921, and, after pointing out that claims of this nature are recurrent and the benefits of that act were being denied certain military personnel evidently entitled thereto, recommended that the claim be made the subject of a departmental reference to the Court of Claims.

Acting for the Secretary of War, and pursuant to the duty of supervising and acting upon claims by or against the War Department assigned him by the Secretary of War, the Assistant Secretary of War considered this claim and placed the following indorsement thereon:

It is breby certified that the articles of property, in the items and values a found by the Board were reasonaable, useful, necessary, and proper for the claimant to duty, while in quarters, or in the field, that the loss occurred under the circumstances ascertained and determinately the Board and without fault or negligence on the property of the control of the control of the conber replaced in kind from Government property on hand. The value is berefyty under the provisions of the Act of Congress of March 5, 1921, (4f. Stat. 1468) ascertained Child of Finnace the ascents recommended by the

Further, in view of the conflicting opinions mentioned in paragraph 10, above, the Assistant Secretary of War, acting upon the recommendation of the Judge Advocate General and for the reasons given by that officer, decided to make the claim the subject of a departmental reference to the Court of Claims before taking final action thereon.

At the time of this reference the claim had neither been paid nor disallowed and was pending within the jurisdiction of the Secretary of War.

Major Brahson has consented to this reference.

The claim of plaintiff is made under the Act of March 4, 1921 (41 Stat. 1436), of which the pertinent parts are as follows:

SECTION 1. That private property belonging to officers \* \* \* of the Army, \* \* \* which \* \* \* shall hereafter be lost, damaged, or destroyed in the mil-

itary service, shall be replaced, or the damage thereto, or its value recouped to the owner as hereinafter pro-

or its value recouped to the owner as hereinsfter provided, when such loss, damage, or destruction has occurred or shall hereafter occur without fault or negligence on the part of the owner in any of the following circumstances:

property, including the regulating [regulation] allowance of bagages, transferred by a common carrier, or otherwise transported by the proper agent or agency of the United States Government, is lost, damaged, or destroyed; but replacement, recompunent, or commutation in these circumstances, where the property was or shall be transported by a common carrier, shall be limited and above the amount recoverable from said carrier.

The Comptroller General as shown above in considering former cases disclosing facts of the ame nature where "the property was damaged while being transported to the off-military duties" had been as the off-military duties military duties when the stationed where military duties and the state of the off-military duties and the stationed where military duties a lactive duty when the transportation of his effects commenced his property was not damaged in the military duties of the state of the sta

We think the ruling was erroneous and agree with the

report of the Secretary of War who in discussing the factor and, the case says: "The ext appears of ear and numbiguous, accept for a seeningly unwarranted restriction read into it by the Comptrelies (reneral, obrivant) senhorces Major Brubseche (reneral, obrivant) senhorces Major Brubseche (reneral, obrivant) senhorces Major Brubseche (reneral, obrivant) sentences and office acting under military orders is "in the military servies". If there be any doubt about this interpretation, we think that in removed by the further statement in section 1 that the value of the property lost shall be recouped "in any of the value of the property lost shall be recouped "in any of the property lost shall be reconsidered in any of the property lost shall be reconsidered in the property lost shall be reconsidered to the property lost shall be recon

Third. When during travel under orders such private property, including the regulation allowance of baggage, transferred by a common carrier, or otherwise transported by the proper agent or agency of the United States Government, is lost, damaged, or destroyed, \* \* \* U. S. Code, Title 31, Sec. 218.

The plaintiff was travelling "under orders" and the property was being "transported by the proper agent or agency of the United States Government". See Regnies v. The United States, 92 C. Cls. 437.

The case being one where the law authorizes us to render judgment, the claimant having consented to this reference, judgment accordingly will be entered against the defendant for \$47.24. The Department will be so advised.

Jones, Judge; Whitaker, Judge; and Whaley, Chief Justice, concur.

Letteron, Judge, took no part in the decision of this case.

THE CHICKASAW NATION v. THE UNITED STATES AND THE CHOCTAW NATION

[No. K-338. Decided December 1, 1941. Motion of defendant, Choctaw Nation, for new trial overruled February 2, 1942]

# On the Proofs

Indian colonic, allicinents in Productor of the Checken Nation, Proiried lends their do common by the Checken Nations and the Chickenser Nation—In the Institut suit, substituted by the Chickenser Nation—The Institut suit, substituted by the tion, plastiff, chains composition for the on-forthy linears in the lands albited to the Productor of the contraction of the Chicken Nation and the Checken Nation and the Checken Nation; and it is had by the court that the arrangement of the "Athbox agreement," whereby the Chicken of the Chocken Nation; and to of the plastiff, was incorporated into the "supplemental agreement," of 100 as an obligation of the Chocken Nation; and not accordingly the plastiff is

Stome; allotments to Chicknasso Freedman.—It is shown by the evidence adduced that the Chicknasso server adopted that income adduced that the Chicknasso server adopted that inmen, as provided under the treaty of 1898 and subsequent seleor Congress, and no allotments were made to said Chicknasso freedmen from tribal lands as therein provided; that said Chicknasso freedmen did, however, receive allotments under Experies's Estimated of the Case
the Supplemental angenomed "of 1000, which althorists were
paid for by the blaided States and hence cost seither the Chickmassware the Chickware springing; that the addressed to the
comman by the two nations, and hence the Chickware concomman by the two nations, and hence the Chickware confrontled to said allocates their properties, which was onefourth, as recognized by treating, statutes and practice; that
the Chickware when consistently chickward that settlers end of
freedom should be provided with into in the openies of the
Chickware, which chick was assented to by the Chickware,
which chickware said chickware are con-

the Court of Claims in 1806 for a modification of the decree in the Chicksone Freedmen case (38 C. Cla. 588; 193 U. S. 115). Same; trooty of 1866.—The rights of the freedmen of the two nations were not regarded as settled, and were not settled, by the treat of 1896.

Some; "supplemental spressure," of 1902.—The "supplemental approaches approaches and supplemental approaches and approaches and approaches and approaches and allocated from allocated to numbers of the respective nations; and as to the Clofkeauer misotropic in the Court of Clulina as to whether and Clofkeauer freedomes were cattled to allotments from tribal lands or whether the Clutic State should supply at the expense and

The Reporter's statement of the case:

Mr. Melven Cornish for plaintiff.
Mr. Charles H. Small, with whom was Mr. Assistant
Attorney General Norman M. Littell, for the United States.

Mr. Raymond T. Nagle was on the brief.

Mr. William G. Stigler for the Choctaw Nation.

The decision in this case was filed December 1, 1941, holding that the plaintiff was entitled to recover from the defendant, the Choctaw Nation, and reserving the determination of the amount of recovery for further proceedings pursuant to Rule 39a. The court did not consider what was the liability, if

any, of the defendant, the United States.

The defendant, the Choctaw Nation, filed a motion for new trial, on the grounds, among others, that the court was in error in concluding that the plaintiff was not entitled to

Reporter's Statement of the Case
recover against the defendant, the United States, but against
the defendant, the Choctaw Nation. On February 2, 1942,
said motion for new trial was overruled.

The court made special findings of fact as follows:

 This suit was filed pursuant to an act of Congress of June 7, 1934 (43 Stat. 537), which so far as here material, provided as follows:

That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the large of time to Court of Claims, notwithstanding the large of time judicities and render judigment in any and all legal and equitable claims arising under or govering out of any treaty or agreement between the United States and the either of them, or arising under or growing out of any Act of Congress in relation to Indian affairs which said Capital and Capital Capi

The time for filing such suits was extended to June 30, 1930, by a Joint Resolution of February 19, 1929 (45 Stat. 1229, 1230).

2. The treaty of April 28, 1866 (14 Stat. 769), between the United States and the Choctaw and Chickasaw Nations, provided, inter alia, as follows:

ARTICLE II. The Choctaws and Chickasaws hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in punishment of crime whereof the parties shall have been duly convicted, in accordance with laws applicable to all members of the particular nation, shall ever exist in said

nations.

Arricus III. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby celed to the United States the territory west of the 8% west longitude, known as the lessed district, provided that the said sum shall be invested and held percent, in trust for the said nations, until the legislatures of the Choctaw and Chickasaw Nations, restoc-

192 Reporter's Statement of the Case tively, shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter-less such sum, at the rate of one hundred

from the said nations, respectively. And should the said laws, rules, and regulations not be made by the legislatures of the said nations, respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw Nations. and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper-the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove: those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof. but shall be upon the same footing as other citizens of the United States in the said nations.

dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules, and regulations shall elect to remove and actually remove

Article III was not complied with within the two year period by either the Choctaws or the Chickasaws. The United States did not remove any freedmen pursuant to the treaty.

3. By an act of Congress approved May II, 1882 (20) Stat. 68, 73), the sum of \$\$10,000 was appropriated out of the \$\$300,000 reserved by article III of the treaty of 1896 for the education of the froedmen of the Chotcaw and Chicksaw Nations. It was provided that either tribe might before the expenditure was made, adopt in freedom in accordance with article III of the treaty of 1896 and in and over the the tribe, in its morpes above.

By a measure of the general council of the Choctaw Nation approved May 21, 1883, entitled "An Act to adopt the freedmen of the Choctaw Nation," enacted in conformity with the act of Congress approved May 17, 1882 (supra), the Choctaw Nation adopted its freedmen. Sections 1 and 3 provided:

SEC. J. Be it enacted by the General Connell of the Choctaw Nation assembled, that all persons of African descent resident in the Choctaw Nation at the date of the treaty of Fort Smith, Sept. 15, 1855, and their or Chicksaws, are hereby declared to be entitled to or Chicksaws, are hereby declared to be entitled to and invested with all the right, privileges, and immunities, including the right of suffrage of citizens and the public domain of the nation.

SEC. 3. Be it further enacted, that all said persons are hereby declared to be entitled to forty acres each of the lands of the nation, to be selected and held by them under the same title and upon the same terms as the Choctaws.

No permanent allotments were ever made under this legislation.

The Chickesaws did not adopt their freedmen and objected to allotments to the Choctaw freedmen out of the commonly owned lands.

4. The Chicksaw Nation, the Choctaw Nation, and the members of the Dawes Commission to the Five Civilized Tribes, on behalf of the United States, entered into an agreement on April 23, 1807, known as the "Atoka" agreement, providing for allotments in severalty of their common lands and the sale or disposition of other common properties of the tribes. This agreement as amended, was

THE CHICKASAW NATION

Resorter's Statement of the Case
ratified and confirmed by the Curtis act (30 Stat. 495,
503), and made a part thereof, and was subsequently
approved by a majority vote of the members of each of
the tribes.

5. The original Atoka Agreement, between the Commissioners for the United States and the Choctaw and Chickasaws Nations was negotiated at Atoka, in the Indian Territory and signed on April 28, 1897. Chairman Dawes of the Commission was not present.

The agreement provided for forty-acre allotments to the Choctaw freedmen and contained a provision for the reduction of the allotments of Choctaw Indian citizens on account of the allotments to Choctaw freedmen, as follows:

Provided that the lands allotted to the Choctaw freedmen, are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw tribe, so as to reduce the allottments to the Choctaw tribe, so as to reduce the allottments to the Choctaw tribe, so as to reduce the allottments to the Choctaw tribe, so as to reduce the allottments to the value of the allotments to the Chickasawa.

The Agreement contained no provision relating to allotments to the Chickasaw freedmen.

6. The agreement as ratified by the Act of Congress of June 29, 1898 (30 Stat. 495), was amended by providing for the 40-acre allotments to the Chickasaw Freedmen, but with the condition that such allotments were.

\* \* \* to be selected, held and used by them until their rights under said treaty [the Treaty of 1886], shall be determined, in such manner as shall hereafter be provided by Act of Congress;

and the provision (set out in the preceding paragraph), for the reduction of the allotments of Choctaw Indian citizens on account of allotments of the Choctaw Freedmen, was amended by providing that the allotments of Chickassw Indian citizens be also reduced on account of allotments to the Chickassw Freedmen, as follows:

That the lands allotted to the Choctaw and Chicksass freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickassw tribe so as to reduce the allotment to the Choctaws and Chickassws by the value of the same. 7. The Chieff of the Chieff of the Chieff of the Chieff States we Match the Cheef Seates of March 21, 1962 (28 Stat. 641). This agreement, known as the Stappenents agreement, channel detailed provisions for the enrollment of the members and freedmen of the Cheef was and Chieff of the members and present and allotter and Chieff of the States of the Chieff of the Ch

8. The Supplemental Agreement provided in sections 8t o40, inclusive, for a suit in the United States Court of Claims, with right of appeal to the Supreme Court, to test the rights of the Chicknaw freedmen to the commonly owned lands alloued to them under the Atoka Agreement. These sections appeared under the heading "Chicknaw Freedmen."

Sections 36, 37, and 40 provided:

36. Authority is hereby conferred upon the Court of Claims to determine the existing controversy respecting the relations of the Chickesaw freedmen to the heads of the Chickesaw freedmen to the lands of the Choctaw and Chicksaw Intoise under the third article of the treaty of eighteen hundred and sixty-eigh, between the United States and the Choctaw and Chickesaw nations, and under any and all laws by Courress.

The state is hereby directed, no beard of the United States is hereby directed, no beard of the United States, to file in said Court of Claims, within sixty days after this agreement becomes effective, a bill of interplander this agreement, a bill of interplander of the country of the Chickesaw Irections, setting forth the existing contravery between the Chickesaw Station and the Chickesaw freedmen and praying that the defendants thereto be required to interplend and settle their respective rights

40. In the meantime the Commission to the Five Civilized Tribes shall make a roll of the Chickssaw

Reporter's Statement of the Case freedmen and their descendants, as provided in the Atoka agreement, and shall make allotments to them as provided in this agreement, which said allotments shall be held by the said Chickasaw freedmen, not as temporary allotments, but as final allotments, and in the event that it shall be finally determined in said suit that the Chickasaw freedmen are not independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw nations according to their respective interests, and against the United States, for the value of the lands so allotted to the Chickasaw freedmen as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw nations against the United States or the said freedmen on account of the taking of the said lands for allotment to said freedmen: Provided. That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid.

# It was provided in section 68 that:

No act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw nations.

9. At the time of the negotiations for the Supplemental Agreement in Washington, D. G., in February and March 1982, the Chickenave insisted that the agreement contain to the Chickenave insisted that the agreement contain to Chicatar Ferdenium made at the expense of the Chickenave interest in the commonly owned lands. After concrete with the assistant attorney general, who was legal advisor to the Department of the Interior, it was agreed included to protect their interests.

10. Suit was brought as provided in sections 36-40 of the Supplemental Agreement. Judgment for \$606,936.08 was rendered against the United States and paid to the two Reporter's Statement of the Case nations, in the proportion of one-fourth to the Chickasaws and three-fourths to the Choctaws (38 C. Cls. 558, 198 U. S. 115).

11. In that suit, prior to the entry of final judgment on January 24, 19(10), the Chockaws filed an "Application for Additional Decree" in which they set out that the Chickassaws were entitled to pay for their proportional interest in the commonly owned lands allotted to the Chockaws from an or requested the court to enter a supplemental decree deducting from their proportionate share of the judgment one-found to the value of the judgment of the judgment of the proportional conduction of the value of the judgment of the judgment of the judgment of the judgment.

No action was ever taken by the Court on this request. I2. On March 1, 1910, the Governor of the Chicksaw Nation wrote to the Commissioner of Indian Affairs reguesting permission to employ separate counsel for the quest the Chicksaws claim for componention for land allotted to the Chockaw freedom out of the common domain of the two nations without the Chicksaws and Indicated the Chicksaws had had no atterney to express them at the time that Lindagement and the Chicksaws and the Chicks

March 16, 1910, denial of the request was recommended by the Commissioner of Indian Affairs on the ground that in view of the admission of the Choctaws in their request for an additional decree, judicial action did not seem to be necessary to settle the controvery. A final determination was promised within ten days. No such determination seems ever to have been made.

13. The Chickasaw Nation has never received any compensation for its common interest in the lands allotted to the Choctaw Freedmen, by the reduction of the allotments of Choctaw Indian citizens, or by an adjustment or settlement otherwise.

14. The Superintendent for the Five Civilized Tribes reported on July 26, 1939, that allotments had been made Opinion of the Court
to 5,973 Choctaw freedmen of 266,435.13 acres of land,
the appraised value of which for allotment purposes was
\$763,739.12.

The court decided that the plaintiff was entitled to recover against the defendant, the Choctaw Nation, but the determination of the amount of recovery was reserved for further proceedings. (See Rule 89a.)

Madden, Judge, delivered the opinion of the court:

By a treaty between the United States and the tribes, the Chickassaw and Choctaw tribes of Indians beld lands in what is now Oklahoma. "In common; so that each and every member of either tribe shall have an equal undivided interest in the whole." The tribes took part in the Civil War on the side of the Confederacy. In 1866, by treaty, the tribes renewed their allegiance to the United States and acknowledged themselves to be under its protection."

In 1896 in a treaty between the United States and the thirds, the tribes agreed to aboids lawery. In Article III of the treaty, the tribes coded to the United States a part of their territory, in consideration of the sum of \$800,000 to be held in trust by the United States, until the legilatures of the tribes abould within two years confer groun their former slaves, or freedmen the privileges of citizens, excepting rights in the "annutites, moneys, and public domain of the tribes," and also abould give each freedman forty acree of land. It provided that if these benefits were not conferred upon the refemens, the United States would be more in trust for the freedings.

The tribes did not adopt the specified legislation within the two-year period and the United States did not thereafter remove the freedmen. Hence they remained with the Indians without defined political status or property rights. In 1882 Congress again offered a financial inducement to either tribe which would adopt its freedmen in accordance

<sup>&</sup>lt;sup>1</sup> See The Chicksone Freedom, 193 U. S. 115, affirming SS C. Cla. 558, for a fulber recifal of pertinent early history. For other phases of the present controversy, see The Checkson and Chicksone Mations v. The United States, 81 C. Cls. 63.

Opinion of the Court with the terms of Article III of the treaty of 1866 (22 Stat. 68, 72). The Choctaws adopted legislation to this end in 1883, but attached qualifications which may have prevented it from complying with the treaty of 1866. This legislation probably conferred political rights upon the Choctaw freedmen, but there is no showing that any land was permanently allotted to them. Between this time and 1897 the Choctaws desired to give their freedmen allotments, and the Chickasawa were unwilling to adopt theirs, or to permit the Choctaws to give lands to the Choctaw freedmen out of the common tribal lands. In 1897 the United States Commission to the Five Civilized Tribes (the Dawes Commission) negotiated at Atoka, in the Indian Territory, a proposed agreement with the Choctaws and Chickasaws which provided that all tribal lands should be allotted to the Choctaws and Chickasaws, except that the Choctaw freedmen should each receive forty acres, and that the amounts of land so allotted to the Choctaw freedmen should be subtracted from the amounts which would otherwise have been allotted to the Choctaw Indians. By this arrangement the Choctaws would have been giving lands to their freedmen out of their own share, and the Chickasaws would have been making no contribution from their share of the lands. The Chickasaw freedmen were not mentioned in the proposed agreement, it apparently being understood that they had not been adopted and had no rights.

and occur amoputation under rights and rolling and when the proposed agreement was sent to Washington, it was modified before being emacted by Congress in 1898 as a part of the Cutris Act (20 Stat. 448, 500), to give the Chicksaw freedmen as well as the Chockaw freedmen as well as the Chockaw freedmen of each tribe to be subtracted from the allotments to the freedmen of each tribe to be subtracted from the allotments to the Indians of that tribe. Each tribe was, therefore, to furnish the land for its own Each tribe was, therefore, to furnish the land for its own they should each be allotted forty acres to be selected, but the sense of the control of the cont

agreement as enacted by Congress was approved by a

majority vote of the members of each of the tribes,

A "supplemental" agreement was made on March 21, 1902, between the United States and the two tribes, which was embodied on July 1 of that year in an act of Congress (32 Stat. 641) and ratified by the citizens of the two tribes. This agreement contained detailed provisions for the enrollment of the members and freedmen of the tribes, the allotment to each member of 320 acres instead of the allotment of all the land as in the Atoka agreement, the allotment to each Choctaw and Chickasaw freedman of 40 acres, the sale of the remaining unallotted land and the distribution of the proceeds.2

The supplemental agreement had no provision analogous to the provision of the Atoka agreement as negotiated at Atoka requiring the Choctaws to provide for their own freedmen by subtraction from their own allotment, nor to the provision of that agreement as enacted by Congress making the same requirement of both the Choctaws and Chickasaws. It did, however, in section 36 take notice of the Chickesaw claim that its freedmen had no rights, by conferring authority upon the Court of Claims to determine whether such freedmen had rights in the tribal lands under the treaty of 1866 and subsequent legislation. To that end it directed the Attorney General of the United States to file a bill of interpleader in the Court of Claims against the Chartaws and Chicknesses and the Chickness freedmen

Sections 40 and 68 of the supplemental agreement, as enacted by Congress, were as follows:

40. In the meantime the Commission to the Five Civilized Tribes shall make a roll of the Chickasaw freedmen and their descendants, as provided in the Atoka agreement, and shall make allotments to them as provided in this agreement, which said allotments shall be held by the said Chickasaw freedmen, not as temporary allotments, but as final allotments, and in the event that it shall be finally determined in said suit that the Chickasaw freedmen are not, independently of this agreement, entitled to allotments in the Choctaw

See The Choctop Nation Y. The United States and The Chickness Nation, 83 C. Cla. 140, 144.

Opinion of the Court and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw nations according to their respective interests, and against the United States, for the value of the lands so allotted to the Chickasaw freedmen as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw nations against the United States or the said freedmen on account of the taking of the said lands for allotment to said freedmen: Provided, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid,

68. No act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw nations.

The suit in the Court of Claims was filed, and the court held \* that the Chickasaw freedmen had no rights prior to the enactment of the supplemental agreement. It therefore rendered judgment against the United States in favor of the two tribes in the proportion of one-fourth to the Chickasaws and three-fourths to the Choctaws ' for the value of the land allotted to the Chickasaw freedmen. The amount of the judgment was ultimately determined to be \$606,936,08 which was paid to the tribes in the specified proportions. Prior to the entry of final judgment in that suit on January 24, 1910, the Choctaws filed an "Application for Additional Decree" stating that the Chickasaws were entitled to be paid for their proportionate one-fourth interest in the commonly owned lands allotted to the Choctaw freedmen and requesting the court to enter a supplemental decree deducting the amount to which the Chickasaws would be thus entitled from

<sup>\*</sup> United States v. The Chectase Nation, 38 C. Cla. 558, affirmed sub nom. The Chickensus Prontess. 192 U. S. 115.

<sup>\*</sup>These are the proper proportions recognized by treaties, attaines, and praetice of the shares of the two tribes in such distributions. See The Cheekse Notion v. the United States and the Chichason Notion of Indians, SS C. Cla. 140.

Opinion of the Court
the Choctaws' share of the instant judgment. This court
did not act upon that request, apparently because it was
beyond the scope of the enabling act under which the suit
was brought.

On March 11, 1910, the Governor of the Chickasaw Nation wrote to the Commissioner of Indian Affairs requesting permission to employ commel for the Chickasaw Nation and sating the Chickasaw chain which is the subject of this suit. This request was not acted upon, an interdepartmental recommendation suping that in view of the Chockaw's admission of liability in their request for an additional decrea, but the control of the Chickaw's demandation of t

The enabling act of Congress authorizing this suit was passed on June 7, 1924 (43 Stat. 537). The Chickasaws claim compensation for their one-fourth interest in the common tribal lands allotted to the Choctaw freedmen under the supplemental agreement of 1999, with interest.

The foregoing recital shows that the Chickasaws never adopted their freedmen; that their freedmen did receive allotments under the agreement of 1902, but that these allotments were paid for by the United States, and hence cost neither the Chickeenwe nor the Chectews enviling that the allotments to the Choctaw freedmen were made from the commonly owned tribal lands, and hence the Chickasaws contributed one-fourth of those allotments: that the Chickssaws have consistently claimed that neither set of freedmen should be provided with land at the expense of the Chickssaws; that the Choctaws, in the agreement negotiated at Atoka in 1897 assented to this position by agreeing that the Choctaws should provide allotments for their freedmen by deductions from their own allotments and by omitting any provision at all for allotments to Chickasaw freedmen; that the Choctaws again, in their application to the Court of Claims in 1909 for a modification of the decree in the Chickasaw freedmen case, desired to compensate the Chickasaws for their contribution to the allotments of the Choctaw freedmen.

The defendants, the United States and the Choctaw Nation, assert that the Chickasawa assented, in the treaty of 1866, in the Atolka agreement as emeted by Congress in 1866, in the Atolka agreement as emeted by Congress in adoption by the Choctawa of their freedmen and the alloment of land to bem. Whatever may have been the power of the Choctawa, under the treaty standing alone, to make such a wholesale adoption," and give such adopted persons a shave in the Chickasawa interest in the lands, the whole bintery of the controversy shows that none of the parties were no interpreted the treaty. This subject of the plant is sufficient to the controversy shows the controversity of the state of the plant of the controversity of the plant of the state of the plant of the plant of the plant of the plant of the state of the plant of the plant of the plant of the plant of the state of the plant of the plant of the plant of the plant of the state of the plant of the state of the plant of

by the treaty of 1866.
As to the Chicksnaw' consenting in the Atoka agreement and the agreement of 1969 to the Choctaw's doopting their reductions and providing them with land, there was, of course, freedomen and providing them with land, there was, of course, the second of the consent the terms were than the Choctaw were to provide the land for their own freedomen by substraction from their own allottenests. As that agreement was enacted by Congress, the same provision was made for the Chicksnaws, but their freedoms's allottenests were made temporary and subject to Arribe determination as to their rights. So the consent

freedimen at the expense of the Chicksawws.
The supplemental agreement of 1902 is, therefore, the determining factor. That agreement, as we have said above.
Chocks was dichlosaw freedimen. It consisted the provision of the Atoka agreement for deduction from allotments to members. As to the Chicksaw freedimen, allotments to the chicksaw freedimen, it provided for determination in the Court of Chims as to whether they the Chicksaw facetime, the control of the Chicksaw facetime, it is not better the chicksaw facetime, and the control of the Chicksaw facetime, and the control of the Chicksaw facetime, and the chicksaw facetime facetimes are consistent of the Chicksaw facetimes and the Chicksaw facetimes are consistent of the Chicksaw facetimes and the Chicksaw facetimes are consistent of the Chicksaw facetimes and the Chicksaw facetimes are consistent of the Chicksaw facetimes and the Chicksaw facetimes are consistent of the Chicksaw facetimes and the Chicksaw facetimes are consistent of the Chicksaw facetimes and the Chicksaw facetimes are consistent of the Chicksaw facetimes and the Chicksaw facetimes are consistent of the Chicksaw facetimes and the Chicksaw facetimes are consistent of the Chicksaw facetimes and the Chicksaw facetimes are consistent of the Chicksaw facetimes and the Chicksaw facetimes are consistent of the Chicksaw facetimes are consistent of the Chicksaw facetimes and the Chicksaw facetimes are consistent of the Chicksaw facetimes and the Chicksaw facetimes are consistent of the Chicksaw facetimes and the Chicksaw facetimes are consistent of the Chicksaw facetimes and the Chicksaw facetimes are consistent of the Chicksaw facetimes and the Chicksaw facetimes are consistent of the Chicksaw facetimes and the Chicksaw facetimes are consistent of the Chicksaw facetimes are consistent of the Chicksaw facetimes and the Chicksaw facetimes are consistent of the Chicksaw facetimes and the Chicksaw facetimes are consistent of the Chicksaw facetimes are consistent of the Chicksaw facetimes are consistent of

The Superintendent for the Five Civilized Tribes reported on July 28, 1939, that allocatents had been made to 5,973 Chectaw freeduces of 266,435.13 acres of land, the autoralized valve of which for allocatent perioses was \$193.739.12.

Opinion of the Court

expense. In section 68 it repealed inconsistent provisions of the Atoka agreement.

Plaintiff claims, and we have found, that in the negotiation for the supplemental agreement of 1902, plaintiff asserted that it should not have to contribute to the allotments for Choctaw freedmen, and that the proviso inserted in section 40 was drawn, in part, for the purpose of protecting it from that burden. The language is as follows:

Provided, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid.

This language is not well chosen for the purpose for which plaintiff claims and we find it was inserted. It relates, on its face, only to the matters "contained in this paragraph," and the paragraph relates to allotments to the Chickasaw freedmen and the suit in the Court of Claims to determine the rights of those freedmen, and of the rights of the two tribes to compensation for those allotments. Yet the determination of the matters to which the paragraph directly relates might well have had effects upon the question at issue in this litigation. If this court had held in that litigation that the Chickasaw freedmen were entitled to allotments from the tribal lands, there would have been the question as to whether those allotments should be taken from the Chickssaw interest in the lands or from the interests of both tribes, and that would have raised a similar question as to the Choctaw freedmen's allotments

If the proviso had related only to the allotments to Chickses we freedmen, it would have been natural for the language not to speak generally of "allotments to freedmen" as it did, but to speak of "allotments to said (or such) freedmen" or "allotments to Chicksaw freedmen." Three times earlier in the same paragraph "Chicksaw freedmen" are mentioned, and twice just before the proviso "faid freedmen" are referred to. The mention in the proviso, in the alternative,

of "the money, if any, recovered as aforesaid," does not, we think, make it certain that the provise was speaking only of the Chickasaw freedmen's allotments. It no doubt included them, but we think it also included the Choctaw allotments.

It would have been strange for plaintiff to have, for no reason which has been suggested, yielded its position on the point of the Choctav freedmen's allotments in 1903, after having maintained it consistently for so long. If it had no yielded in 1902, it is impossible that the Choctave in the paragraph had been completed, snught to present to the Chicksaws a large sum of money in compensation for the claim, at a time when the Chicksaws were not even represented by an atorney. We have no doubt that the CW concludes therefore, that the arrangement of the

Atom agreement whereby the Chectaw freedmen were to be furnished their allottenate at the expense of the Chectaw and not of plaintiff was incorporated into the supplemental agreement of 100,0, as an obligation of the Chectaw Nation is party to this suit, having been made such pursuant to Section 6 of the Jurisdictions. Since the Chectaw Nation is a party to this suit, having been made such pursuant to Section 6 of the Jurisdictions is under which this suit is brought, we conclude that plaintiff is entitled to recover from the Chectaw Nation, but the determination of the amount of the recovery is reserved for further proceedings pursuant to Sale 30 (a).

The primary obligation being that of the defendant, the Choctaw Nation, and there being no claim that that defendant is unable to satisfy whatever judgment may be rendered, we do not consider nor decide what is the liability, if any, of the defendant, the United States.

It is so ordered

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Jones, Judge; Whitaker, Judge; Lettlevon, Judge; and Whalet, Chief Justice, concur.

### TRIEST & EARLE, INC., A CORPORATION, v. THE UNITED STATES

[No. 43310. Decided December 1, 1941. Plaintiff's motion for new trial overruled February 2, 1942]

# On the Proofs

Government contract; excess cost; additional work; liquidated damgoes for delay.--- Under a contract entered into by the plaintiff to furnish all labor and material and perform all work required for the construction of a movable-man bighway bridge over the branch channel of the Chesapeake & Delaware Canal at Delaware City, Delaware; it is hold that the plaintiff is not entitled to recover for excess cost and damage alleged to have resulted from misrepresentations as to character of material to be encountered in the performance of the work called for by the contract nor for alleged extra work nor for liquidated damages alleged to have been erroneously withheld by the defendant for delay in completion of the work.

Same; failure to interpret properly data furnished.-Where it is shown by the evidence that the conditions encountered by the plaintiff in excavating for the east pier were not different from what might reasonably have been expected from an examination of the specifications and drawings; and where it is shown that the information recorded by the defendant and made availshie to hidders fairly represented the nature of the material to be excavated and the conditions to be encountered; it is held that the increased cost incurred by the plaintiff by reason of the difficulties encountered was due to plaintiff's failure to interpret properly the data furnished by the defendant and not from any misrepresentation by the defendant nor defendant's failure to furnish plaintiff with all the information had by

defendant. Same; exira pay for extra scork,-Where in the construction of the west pier additional work was required by the contracting officer and plaintiff was granted extra time therefor and was paid the agreed compensation therefor; it is held that the proof does not sustain plaintiff's claim that plaintiff should

have been paid more. Same: liquidated damages.-It is shown by the evidence that the decision of the contracting officer holding plaintiff responsible for 80 days' delay was correct and liquidated damages were accordingly properly deducted therefor in accordance with the terms of the contract

The Reporter's statement of the case:

Mr. Josephus C. Trimble for the plaintiff.

Mr. Robert E. Mitchell, with whom was Mr. Assistant Atterney General Samuel O. Clark, Jr., for the defendant. Mr. Charles H. McCarthy was on the brief.

Plaintiff seeks to recover \$19,198 made up of \$15,198. ex-

cess cost and damage alleged to have resulted from misrepresentations as to character of material to be encountered in performance of the work called for by the contract and alleged extra work, and \$4,000 alleged to have been erroneously withheld by the defendant as liquidated damages for delay in completion of the work under the contract.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The plaintiff, a Pennsylvania corporation, entered into a contract with the defendant February 6, 1993, represented

by Earl I. Brown, colonel, Corps of Engineers, District Engineer, War Department, as contracting officer, whereby plaintiff agreed to furnish all above and materials and perform all work required for the construction of a moruble-span highwork required for the construction of a moruble-span highcontraction of the contraction of the contraction of the contracction of 180,785; additional concrete 810 a cubic yard; untreated wood piles 40 cents a linear foot; increase in length of reconcider wood piles 50 cents a linear foot; increase in length of the contract. The work was to be commenced within 30 completed within 176 calendar days after date of such receipt. The contract, with drawings and specifications, is in evi-

dence and is made a part hereof by reference.

Notice to proceed was received by plaintiff March 8, 1833, thus fixing the ultimate date for completion August 30, 1838. 2. The plans and specifications for the bridge to be constructed were prepared by consulting engineers under the direction of the contracting officer. Two wash borings had been taken at the site in the sorting of 1929 by the consulting

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engineers for the Gov	er's Statement of the Case rernment, and were located Boring No. 1	
alongside the west pier and Boring No. 2 about 30 feet from		
	was made of the borings and, with their	
location, shown on sh-	set No. 2 of the contract drawings. The	
log of Boring No. 1, a	o shown, is as follows:	
Elevation	Material	
	Coarse gray sand and some fine gravel. Easy going.	
	Same. Easy driving and jetting.	
-13 to -15	Course gravel. Some sandstone, Particles of mica.	
	Sandstone with yellowish brown clay. Hard driving and fetting.	
	Dark gray sandy clay. Fairly hard driving and jetting.	
	Same with small pieces broken oyster shell. Hard driving and letting.	
	Very fine black sand. See sample No. 14. Easy driving and jetting.	
	Fine gray sand and mica. Fairly easy	
	Hard tough bluish clay with occasional pieces of sandstone. See sample No. 15. Hard driving and letting.	
-45 to -51	Same ctay. Hard driving and jetting.	
	Same ciny with small pieces of shell. Hard driving and jetting.	
-57 to -63	Same clay. Hard driving and fetting	
Beyond	Same clay. Fairly hard driving and jetting.	
The log of Boring No. 2, so shown, is as follows:		
+7.5 to -10	Soft black mud and sand. Basy going.	
-10 to -14	Soft black mud and sand with a little black clay. Easy going.	
	Fine gravel and sand. Hard driving and letting.	
	Gravel and gray sandstone with a little dark	
-26 to -29	gray cay. Bard driving and jetting.  Dark gray sandy clay with pieces of sand- stone and broken shell. Hard driving and jetting.	
-29 to -82	Very fine black sand. Sample No. 14.	

Easy driving and jetting.

Sine gray sand with some mica and fine gravel. Fairly bard driving and jetting.

Report	er's Statement of the Case
Elevation	Material
-86 to -44	Hard tough bluish gray clay with a few pleces of sandstone. See sample No. 15. Hard driving.
-44 to -50	Hard tough gray clay with occasional pieces of sandstone. Fairly hard going.
-50 to -56	Same hard tough gray clay with same sand- stone. Hard driving and jetting.
-56 to -62	Hard dark gray clay. Fairly hard driving and jetting.
Beyond	Hard dark gray clay mixed with a little mics and sandstone. Fairly hard driving and jetting.
The elevations refe	er to Delaware River datum.

The contract drawings, including sheet No. 2, had been furnished the plaintiff for use in bidding for the work, and were used by plaintiff in making up its bid.

3. In excavating for the piers plaintiff used the open cofferdam method, according to which steel sheet piling was driven around the location of the pier and excavation made from the area thus inclosed down toward the base of the piling, short thereof a sufficient distance to give the piling a good footbold. As the excevation progressed timber walers were placed against the side of the cofferdam to give the steel sheet piling support against pressure from the outside.

The excavation in the cofferdam for the east pier proceeded in a satisfactory manner until elevation of -13 was reached. At about that elevation a thin layer of hardpan was encountered, below which the material was found to be soft running sand. This sand was not stable enough to give sufficient support to the toe of the steel sheet piling, with the result that the sheet piling buckled in from the pressure of the outside, and the base of the cofferdam was deformed. The cofferdam had been designed so as to permit pouring of the concrete without the use of forms for the base.

This failure of the east cofferdem occurred about March 99. 1933. To remedy this situation the contracting officer required other steel sheet piling to be driven on the canal side of the sheet niling that had buckled and, with the additional excavation thus made possible, the contract area was attained and the contract depth of -17 reached.

1 RIEST & LARLE, INC.

Reporter's Statement of the Case

The conditions encountered by plaintiff in excavating for the east pier were not different from what might reasonably have been expected from an examination of the contract, specifications, and drawings, including the log of

tract, specifications, and drawings, including the log of borings as shown therein.

4. The contracting officer, after the foundation surface was thus exposed caused borines to be made in the east

cofferdam, as a result of which he concluded that foundation piles would have to be driven, and they were driven; for this work plaintiff has been duly compensated in money and extension of time. 5. As a result of its experience with the east cofferdam,

plaintiff redesigned the cofferchan for the west pier using longer and stronger steal sheet piling and allowing a greater area for excavation instead of driving to the next line as in the east cofferchan. No serious difficult was encountered in the west cofferchan and the contracting officer, as in the case of the sust cofferchan, non-choiced that the foundation given cutra time and agreed compensation therefor. 6. November 22, 1938, by Chango Order No. 3, the con-

tracting officer ordered certain extra work to be done and for that work allowed plaintiff additional time of two days, thus extending the contract date for completion to September 1, 1833.

7. In March of 1934 the contracting officer made the following findings of fact, transmitting a copy to plaintiff:

Date of receipt by contractor of notice to proceed
with work. March 8, 1938
Date fixed for commencement of work. April 7, 1933
Date fixed for completion of work. Sept. 1, 1933

(2 days allowed for completion of extra work covered by Change Order No. 3, dated November 22, 1933.)

I certify that the contract has been completed in acordance with the terms and conditions thereof, except as to the time limit fixed for completion, and that the work has been accepted by me for and on behalf of the United States.

I find that the work under the contract was delayed and prevented due to unforeseeable causes beyond the Control and without the fault or negligence on the part of the contractor, as follows:

delayed the completion of the work.

On July 8, and from July 15 to August 7, 1958, both dates inclusive.—The work of constructing the west main pier of the bridge west delayed, to permit driving of smillionit bearter of the property of the property of the contraction of the property of the contraction of the property of the soil was assumed to the property of the property of the soil was negative to the property of the property of the soil was piles to an average penetration of 25 feet for the west pier piles to an average penetration of 25 feet for the west pier

delayed the completion of the work.

From July 12 to 14, 1983, both dates incinsive—After the
contractor had completed the work of driving 13 piles for
the enst approach span of the bridge, he was directed to
make further efforts to secure greater pescention for the
make further efforts to secure greater pescention for the
piles were incorporate an arving a satisfactory beauting power.
The extra time spent in driving the piling delayed the
completion of the work.

On August 21, 23, and 24, 1933.—A northeast storm of unusual severity during which the precipitation was 3.70 inches and the maximum wind velocity exceeded 50 miles per hour, prevented any work being done, which delayed the completion of the work. From November 14 to 17, 1933, both dates inclusive.—The

#### Total ...

Weather reports issued by the Forecaster at Philadelphia, Pa., for March 20, April 4 and 12, May 8, August 21, 23, and 24, November 14-17, 1933, inclusive, are attached hereto.

are to delice nested of the constructed at Delawars City, Dela, highwar piproximately 80 miles below Philadelphia, Pa., and weather conditions in this vicinity, are in general, more severe than in the area of Philadelphia, Pa. The storm that commenced on August 21, 1933, was the most severe storm, especially along the Atlantic

Reporter's Statement of the Case Coast, that had been experienced in this section during the present century.

The contractor notified the District Engineer of the delays in the work, which delays were also known and on record at this office through reports as unmitted by U. S. Inspectors assigned to the supervision of the work.

On April 5, 1934, the sunken scow, for which \$900 was withheld on Voucher No. 2561, for March, 1934, Philadelphia, Pa., accounts of Major Mason J. Young, C. E., was removed and satisfactorily disposed of by the contractor without excesse to the United States.

Plaintiff has received the contract price for the work that occasioned the delay of 26 and 25 days referred to in the contracting officer's findings.

For the time and labor spent in efforts to secure greater penetration of the 13 piles for the east approach span of the bridge, the contracting officer did not increase the contract price. Plaintiff drove the 13 piles down to a depth of less than 85 fest, when further penetration became difficult. The plaintiff to continue driving, Plaintiff to continued driving, but was unable to penetrate to 33 feet. The contracting officer accepted the penetration short of 35 feet and allowed plaintiff an extra 3 days for the continued driving. No written order was given or demanded. There is no proof of written order was given or demanded. There is no proof of the stempt to seem further penetration of the piles for the east approach span of the bridge.

east approach span of the bridge.

The cost to plaintiff of the required additional driving, including general overhead, profit, and bond premium, was \$139.

8. The cost to plaintiff of the work on the east cofferdam, over and above what it would have cost had the difficulty in the work thereon, heretofore described, not been encountered, was, including general overhead, profit, and bond

premium, \$10,088.

9. The contract work was completed and accepted January 20, 1894. The allowance by the contracting officer of 61 days for excusable delay brought the contract time for completion from Sentember 1 to November 1, 1983.

Opinion of the Court

There are 80 calendar days from November 1, 1933, through January 20, 1934. Article 3, section 1, division 1, of the specifications laid

liquidated damages for inexcusable delay at \$50 a day. For 80 days the liquidated damages amounted to \$4,000.

In the Comptroller General's settlement on the contract

March 4, 1935, there was withheld \$4,000 from the amount otherwise due on the contract for liquidated damages, being 80 days as aforesaid at \$50 a day.

The delay of 80 days is attributable to the difficulty encountered, as described, in the work on the east cofferdam.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, Judge, delivered the opinion of the court: Plaintiff seeks to revere \$18,196 on the grounds—(1) that defendant in the specifications and drawings, which constituted a part of the contract between the parties, misrepresented the character of the materials which plaintiff would encounter in exercating for the vo piers for the bridge over the branch channel of the Chesapeaks and Delivarue Canal at Delavarue City, Delawaru, and that this resulted in damages of \$10,008 and other for which the defendant was for which it was not fully to a such a superformed for which it was not fully to a such as the country of the countr

for which it was not fully paid.

The semantia facts established to the fact of the fact o

Opinion of the Court information of bidders, as described in finding 2. Most of the testimony introduced by both parties related to the accuracy or inaccuracy of description of the materials and conditions to be encountered as shown on the drawings and described in the specifications for the information of bidders. A study of that testimony convinces us that the information recorded by the defendant and made available to bidders fairly represented the nature of the material to be excavated and the conditions to be encountered. Midland Land & Improvement Company v. United States, 58 C. Cls. 671, 683, 686. The descriptive record made by defendant and furnished to the hidders was the best information the defendant could obtain from borings made; the wash boring material was carefully analyzed and the record of this analysis was all the information which defendant had. Nothing was concealed from the bidders. Pawling & Co. v. United States, 62 C. Cls. 123; Blakeslee d. Sons, Inc., et al. v. United States, 89 C. Cls. 226; General Contracting Corp. v. United States, 88 C. Cls. 214, 247, 248; Triest & Earle, Inc., v. United States, 84 C. Cls. 84, 91,

Paragraph 68 of the specifications stated that the log of borings shown on the contract plane was the best information which the United States had concerning the condition and character of material below the surface of the ground, and proceeded to warn bidders that "these data are only approximate and not guaranteed. The contractor must base his bid more his own interpretation of the data."

Paragraph 67 of the specifications set forth that the material to be removed was believed by the defendant to be mud, and, clay, gravel, and some anadatone and boulders, with possibly loss, other foreign metarials and remains of old constructions, but bidders were expressly cautioned by this specification of "examine the rise and decide for thomselves associated by the contract of the contract of the concept of the contract of the c

The failure of the east cofferdam which gave rise to practically all the excess cost claimed was due to the fact that the sheet steel cofferdam piling was not driven far enough into the ground below the required depth for the pier excavation to support the toe of the piling. As a result of the wet sandy condition of the soil at the bottom of the excavation and the failure of plaintiff to install sufficient timber waters inside the cofferdam near the bottom of the excavation, the sheet piling buckled inwardly at the bottom from outside pressure and the cofferdam was deformed.

In these circumstances we think the increased cost incurred by plaintiff by reason of the difficulties encountered was due to plaintiff shilure properly to interpret the data furnished by the defendant and not from any misrepresentation by the defendant or its failure to furnish plaintiff with all the information it had. MacArthur Brothers Co. v. United States. 288 IL S. R.

As a result of the experience which plaintiff had with the east cofferdam, as above-neurinoed, the plaintiff, before it drove the piling for the west cofferdam, unique conferdam, unique longer and stronger sted for the piling and allowing a greater area for excavation instead of driving the piling to the next lines as had been attempted in the east cofferdam. No difficulty was encountered with the west cofferdam.

At the bottom of the excavation for the west cofferdam, the contracting effect, as he had done in the case of the east cofferdam, concluded that the foundation of the concrete pier to be constructed inside the cofferdam should rest on piles, which were driven, and plaintiff was granted extra time for this work and was paid the agreed compensation therefor. The proof does not sustain plaintiff's claim that it should have been naid more.

The work called for by the contract was completed by plantiff 14d about 18-10. The contracting officer however found that the dalay of 61 days was due to unforcessable causes and held the plaintiff responsible for only 80 days of the delay for which liquidated damages at the date of \$80 a day, as provised in the countext, were deducated. The evidence shows, pletion of the work was stributable to the difficulties are countered by plaintiff in connection with the east conferrien. On the evidence of record, the decision of the contracting officer holding plaintiff responsible for 80 days delay was

Syllabus correct. Liquidated damages in the amount of \$4,000 were therefore properly deducted under the provision of art. 9 of the contract.

Plaintiff is not entitled to recover and the petition will be dismissed. It is so ordered.

Madden, Judge: Jones, Judge: and Whaley, Chief Justice, concur.

WHITAKER, Judge, took no part in the decision of this case.

RODEN COAL COMPANY, INC., PLAINTIFF, AND WALTER F. DOWNEY, AS RECEIVER OF THE FIRST NATIONAL BANK AND TRUST COMPANY AF YONKERS, NEW YORK, INTERVENOR, v. THE

[44255. Decided December 1, 1941. Plaintiff's motion and Intervenor's motion for new trial overruled February 2, 1942]

# On the Proofs

Dredging of naviouble channel; consequential damages to adjacent ing operations in the navigable channel between the Hudson and East Rivers, known as the Harlem River Canal, adjacent to the property on the waterfront of said canal belonging to the plaintiff and used by the plaintiff as a coal yard; and where shortly thereafter cracks and breaks appeared in the surface of said coal yard, and the land began to settle before dredging operations in the vicinity were discontinued; it is held that there was no taking by the defendant, constructive or otherwise, of plaintiff's property; and that any damage to said property to which defendant's authorized dredzing operations may have contributed was indirect and consequential to the exercise by the defendant of its lawful right in maintelping a paylgable waterway, and plaintiff accordingly is not entitled to recover.

Same; just compensation; taking of property.-The defendant did not in any way encreach upon the property rights of plaintiff, and under the facts disclosed, there is no justification for application of the principle of a constructive taking upon which to base an implied promise to pay just compensation under the Fifth Amendment, measured either by the value Reporter's Statement of the Case
of the property or by the difference between the market value
thereof before and after the operations by the defendant.

Some.—The plaintiff acquired the property subject to the undeniable

right of the United States to maintain a navigable waterway at the authorized depth and width.

Same.—Whatever effect the defendant's dredging operations may

Some.—weatever enect the accentant's dronging operations may have head upon plaintiff's property, the resulting damage was indirect and consequential to the exercise by the defendant of a lawful power. Drince States v. Lopand, 188 U. S. 4645, and United States v. Cress, 263 U. S. 316, distinguished.
Some: claims under Acts of Congress.—The act of Congress authoris-

ing the maintenance of the Harlem River Canal did not assume any obligation to pay for damages which might result to properly owners as a consequence of such maintenance; and the claim of plaintiff cannot, therefore, be said to be one arising under an act of Congress.

Some.—In order for the Court of Claims to entertain a suit against the Government and to enter judgment the statute upon which the claim is based must grant the right asserted.

The Reporter's statement of the case:

Mr. John Jay McKelvey for the plaintiff.

Mr. Benjamin W. Moore for the intervenor.

Mr. Henry A. Julicher, with whom was Mr. Assistant

Attorney General Francis M. Shea, for the defendant,

Plaintiff seeks to recover \$204,809 for the alleged taking by the defendant under the Fifth Amendment of plaintiff's coal yard property through dredging operations in the

Harlem River Canal.

In the alternative plaintiff claims \$89,162, representing the difference between the market value of the property before and after dredging operations by reason of alleged damage to the property and equipment thereon resulting from such dredging operations.

The defendant denies liability and insists that there was no taking of plaintiff's property and that under the facts disclosed by the record the defendant is not liable for any damage to plaintiff's coal yard property by reason of the collapse of plaintiff's bulkhead adjacent to the canal, even if the dredging operations caused or contributed to the giving away of the bulkhead. Reporter's Statement of the Case

The court, having made the foregoing introductory state-

ment, entered special findings of fact as follows:

1. In 1933 the plaintiff, a New York corporation, acquired tide in fee simple to a tract of land shout 44,888 square feet in area, known as lots Nos. 99 to 114, inclusive, on map of 140 lots on Broadway, West 21814 and adjacent streets and "water front on Harlem River," Borough of Manhattan, City of New York, dated April 23, 1920, signed by George C. Hollerith, 176 Broadway, filed May 24, 1920, in the New York Register's Office so No. 5014.

The property is described in the deed of conveyance also by metes and bounds and the boundary line at the waterfront is described as "the pier and bulkhead line approved by the Secretary of War on October 18, 1920."

2. Before and at the time of the loss and damage herein-

2. Desirer and at the time of the loss and damage intermarter described, the tract was used by plaintiff and its lesses as ond yards, with hoists, coal pockets, scales, offices, bins, cranes, screening plant, and other facilities appertaining to a onal yard. Coal was received by barge at the waterfront and by truck retailed to customers within a radius of approximately five miles.

A ramp led upward from the coal yards to Ninth Avenue, which was its southern boundary. The approach to Broadway Bridge over the waterway bounded the tract on the west.

 The watercourse which separated Manhattan Island from the mainland in early historic times consisted of Harlem River and Spuyten Duyvil Creek, which met and joined at King's Bridge.

In 1873, pursuant to an act of Congress, a survey was undertaken by Government enjoiners looking to the improvement of Harlem River and, in this survey reported February 19, 1874, the desirability of a good vaterway between Hudson River and East River by way of Harlem River and Spurjet Duyvil Creek was indicated. This waterway had for many years been used for navigation, except that at the junction of Spurjeth Duyvil Creek and except that at the junction of Spurjeth Duyvil Creek and water at low tide, and was about 6 feet deep at high tide. As eastly as 1876 the Government enginees were inspire

As early as 1876 the Government engineers were investigating the feasibility, among other plans, of shortening the waterway by cutting a canal across Dyckman's Meadows, in this way avoiding a roundabout loop formed by the approaches to the confluence at King's Bridge. Congress, however, would not authorize this short cut until the necessary land was secured to the United States free of cost.

By 1887 legal difficulties interposed against the project were surmounted, the land was secured free of cost to the United States and preliminary work was undertaken on the cut through Dyckman's Meadows.

cut through Dychman's Meadows.
The cut through Dychman's Meadows was completed in 1895. In 1807 a channel 15 feet deep and 120 feet wide was derdged from Maconhi's Bridge (at about 1504). Street) was derdged from Maconhi's Bridge (at about 1504). Street have involved. The project adopted by Compress and feeted in regulations under acts of Congress, modified from time to time, provided for a channel through Dychman's Meadows of 350 feet in width and 18 feet in depth. The project as a whole, from Long Island Sound to Houlson Street by way of Harlem River, the Dychman's Meadows Maconhi and the Congress, and the Congress of the Congre

minimum cannies depth of 10 set, and the entre vanterway was subject to the shb and flow of riscol, yard was at the junction of Harbon River and Dyckman's Mendows cut-off, and its waterfront, the line established by the Secretary of War October 18, 1930, was also the boundary of land that had been taken in condemnation proceedings in 1886 for the use of the United States in creating the Dyckman's Mendows cut-off. The property in question, on which plain-water the process of the complete your and and facilities were constructed, ever since the complete your dark facilities were constructed, ever since the complete your facilities were found to a navigable artificial waterway.

The channel in front of plaintiff's property has been maintained by the Government at a minimum depth of 15 feet since 1907 by intermittent dredging, with varying width.

For a fair use of the coal yard a minimum depth of 11 feet at the bulkhead was necessary, although at that depth coal barges at low tide would rest on the bottom. 4. Following sarlier dredgings, the Government, in the improvement of navigation on Harlem River and the waterway connecting it with Hudson River, dredged the waterway in the general vicinity of Roden Company's coal yard April 16 to 27, 1926, and November 29, 1829 to January 13, 1920.

On plaintiff's application the War Department issued a permit November 15, 1931, unthorizing the then owner of the property to place steel sheet piling along the face of the existing buildhead, which had the effect of increasing plaintiff's encroachment on the pierbead and buildhead lines of the property of the prope

Further dredging operations by the Government were commenced close to plaintiff's bulkhead November 1, 1937. On that date plaintiff's president communicated with the Government's engineer in charge by telephone and stated that he was fearful that the dredging would damage the company's bulkhead. The Government engineer examined the site early in the morning of November 3, 1937, and discovered that an old crack on plaintiff's land, closed or partially closed in the course of time, was again opening up. Thereupon the dredge was removed from alongside the bulkhead, where it had been operating, to a position midstream, from which it worked gradually shoreward toward the bulkhead, the inspector for the Government in the meantime watching the effect of the dredging upon the bulkhead. November 18, 1937, it was discovered by the inspector that the earth shoreward of the bulkhead had settled about one foot, and that plaintiff was endeavoring to prevent further inclination channelward of the wood and steel sheet piling face of the bulkhead by the use of steel tie rods, the steel sheet piling having apparently likewise been affected by the dredging and thereby subjected to a channelward thrust, Thereupon dredging operations in the vicinity of plaintiff's bulkhead were discontinued.

No dredging in front of plaintiff's property has ever exceeded the authorized project dimensions or the reasonable needs of navigation.

5. The repairs to the bulkhead made in 1981 or shortly thereafter were a part of other repair work made necessary by a settlement that had followed the dradging of 1929–1930. There had been some settlement following the dradging operations of 1926, but not of a serious nature. By the year 1937 it was apparent that dradging close to plaintity bulkhead would place the coal yeard in danger of subsidience

through failure of the bulkhead piling to hold.
6. The dredging of November 1997 did in fact cause a subsidence of plaintiff's only avail and disintegration of the wooden portion of the bulkhead and cribbing back of wooden portion of the bulkhead and cribbing back of the plaintiff's only and another an extent as materially to change the coal year and make an extent as materially to change the coal year and make the effect of westerning the foundation support of the bulkhead piling which was of insufficient depth below the bottom of the river or of sufficient strength to withstand loss of material at its bass, letting the fill back of the bulkhead side down and into the waterway, forcing of the bulkhead side down and into the waterway, forcing the portion of the bulkhead side down and into the waterway, forcing water the coal water of the bulkhead and coal of high tides.

7. The fair and reasonable cost of repairing and reconstructing the property constituting that part of plaintiff's coal yard, damaged or lost through the collapse of a portion of the bulkhead following the dredging operations of November 1987, fixed as of the time of loss or damage, is \$45,044.

No part of the property so lost or damaged has been taken possession of by the defendant, it has not been repaired or reconstructed, and the plaintiff has not been compensated in whole or in part for the loss or damage.

8. The fair market value of plaintiff's coal yard, the land and improvements, immediately before the loss and damage was \$204,809, immediately thereafter \$115,547, a decrease in fair market value of \$89,162.

 Neither the Government nor any of its agents in the preparation of plans for dredging the Harlem River had 219

Opinion of the Court any intention thereby to disturb the bulkhead or natural elevation or grade of plaintiff's land or any reason to expect that such a result would follow. Neither the United States nor any of its agents in fact used, occupied, invaded, or encroached upon plaintiff's land, or any part thereof, during dredging operations or at any time thereafter. The level of the river has not been raised or lowered by the United States and all dredging under the contract was performed in a workmanlike manner and was for the purpose and benefit of navigation by maintaining a 15 foot channel in accordance with law. The plaintiff continues its ownership of the land and facilities and continues to use the same, except that small area which caved in and settled. and is under water at high tide. The sunken area covered by water only at high tide is susceptible of reclamation by bulkheading and backfilling up to the ground elevation or grade existing at the time the bulkhead gave way in 1937. The plaintiff's damages were indirect and consequential due to its failure to maintain an adequate bulkhead and to its neglect to install sufficient foundations for its coal pockets, derrick, and other heavy shore equipment,

The court decided that the plaintiff was not entitled to recover.

LITTLETON, Judge, delivered the opinion of the court:

Plaintiff insists that the facts in this case require the occur to hold (1) that there was a constructive taking by the defendant either of the fee of the entire property of plaintiff, or a part thereof, or of a right therein, such as an essencent of overflow or of alope; or (2) that the dafendant is inhis to plaintiff for loss and damage assistant by it by reason of the leging operations performed pursuant of the property of the property of the property of the measure of the amount recoverable is the sunser case, the measure of the sunount recoverable is the sunser case, the measure

We are of opinion that plaintiff is not entitled to recover for the reason that there was no taking by the defendant, constructive or otherwise, of plaintiffs property, and that any damage which may have resulted to plaintiff's property through the failure of its bulkhead, to which failure the

Opinion of the Court defendant's authorized dredging operations may have con-

tributed, was indirect and consequential to the exercise by the defendant of its lawful right in maintaining a navigable waterway.

The plaintiff company was incorporated in 1925 and in April 1933 acquired title to the property in question, which consisted of a coal yard and certain equipment elevated considerably above the water surface of the Harlem River and supported along the edge of the waterway by a bulkhead consisting in part of wooden piles and in part of wood and sheet steel piles and cribbing. The coal vard in question had been built up by plaintiff and its predecessors in title so as to bring the surface of the property level with the top of the bulkhead.

The tract of land embraced within the coal vard in question consisted of about 44,388 square feet known as lots 99-144 located on the northerly side of West 221st Street. Borough of Manhattan, City of New York, extending to the southerly line of the Harlem River and bounded on the west by the easterly line of Broadway and on the east by the property of the Bradley-Mahoney Coal Corporation. The property extends along the bulkhead line of the Harlem River a distance of 468 feet, about 100 feet landward, with a frontage on Ninth Avenue of 415 feet. The watercourse, now known as the Harlem River, separating Manhattan Island from the mainland, consists of Harlem River and Spuvten Duvvill Creek making a continuous waterway about eight miles in length forming a tidal estuary between the Hudson and East Rivers. The two streams originally met at King's Bridge where the water, at high tide, was six feet deep.

In 1873, pursuant to an Act of Congress, the Government made a survey looking to improvement of Harlem River and, as a result of that survey, reported in February 1874 the desirability of a waterway navigable at all times by way of Harlem River and Spuyten Duyvill Creek. In 1876 the Government, through its engineers, was investigating the possibility of improving the waterway by cutting a channel across Dyckman's Meadows so as to eliminate

Oninion of the Court the loop formed by approaches to the confluence of the Harlem River and Spuyten Duyvill Creek at King's Bridge. However, Congress did not make any funds available for the work of excavating the channel through Dyckman's Meadows until the necessary land and rights incident to construction of the channel had been secured to the United States free of cost. By 1887 the necessary land and rights had been obtained by the United States free of cost, and Congress, in that year, made an appropriation of funds and authorized the construction of the canal through Dyckman's Meadows for the purpose of making Harlem River and Spuyten Duyvill Creek navigable at all times throughout the distance between the Hudson and East Rivers. In 1895 the cut through Dyckman's Meadows was completed and in 1907 a navigable channel 15 feet deep and 150 feet wide was dredged between the Hudson and East Rivers. This channel passed along the frontage of what is now the plaintiff's property. Prior to construction of the cut through Dyckman's Meadows and the dredging of the entire channel between the Hudson and East Rivers, the United States had obtained from the then owners of the property involved in this suit titles to such property and property rights as were necessary to the construction and maintenance of the canal through Dyckmun's Meadows, including any rights adjacent to the actual dimensions of the navigable channel that might be affected by construction of

the navigable waterway.

The record in this case does not show when the bulk-head supporting the property in question along the edge of the navigable waterway was constructed. Percy Roden purchased a part of the property in question in 1963 and the balance in 1994. At the time of this purchase he transferred the property to G. M. Roden & Son, a corporation, and the stock of which was owned by plaintiff and his father. In 1808 Percy Roden purchased the interest of his father of the Roden & Son and thereather, in 1983, the Roden A. Roden & Son and thereather, in 1983, the Roden opined title to the control of the stock of which he owned, acquired title to the coperty in question and has owned the same since that title of the rode o

# Opinion of the Court

Percy Roden purchased the property from the Bagd Transit Construction Company in 1829. At that time, and for a number of years prior thereto, the property had the ame bulkhead constructed of wooden piles and cribing to support the yard which had been constructed landward of the Harless River. The Transit Company had owned and used the property since shout 1800 for unionality baryses and for storage we mbe property of material used by that

For some time prior to 1925 the property in question had been used under lease by the Ames Transfer Company, a dealer in building materials, for unloading and storing, and for delivery of building materials such as sand, gravel, brick, and other building materials. Prior to the date plaintiff acquired title to the property in 1933 it occupied same under a lease from G. M. Roden & Son at a rental of \$1,000 a month, plus taxes and interest on a mortgage of \$125,000. Soon after the property was acquired by Percy Roden in 1923-1924 certain facilities, such as scales and an office building, were constructed on the property and in 1926 large coal pockets and hoppers were constructed for handling coal of all kinds through bins. Cranes and a hoisting plant, with a steam hoist and boiler, to remove coal from barges to the receiving hopper on top of the coal pockets were also constructed. In addition there was constructed a re-screening plant. The construction of these large facilities greatly increased the load which the bulkhead had to bear. At that time the dock along the channel was also enlarged and extended. The waterfront of the property in question, represented by the line established by the Secretary of War October 18, 1920, was also the boundary of the land to which title in fee had been taken by the United States July 10, 1886, in condemnation proceedings for the use of the United States in constructing the cut-off channel 15 feet deep and 150 feet wide as a part of the navigable waterway between the Hudson and East Rivers, as hereinbefore mentioned. Ever since the completion and dredging of the cut-off channel in 1907 the property now owned by plaintiff, including the bulkhead which appears to have been

Opinion of the Court
first constructed about 1900, has fronted on a navigable
artificial waterway of a minimum depth of 15 feet which
the Government has maintained by dredging operation.
Following the earlier dredgings, the defendant in maintaining and improving navigation on the waterway connecting
the Hodson and East Rivers dredged the channel in the gen-

Following the earlier drodgings, the defendant in maintaining and improving navigation on the waterway connecting and improving navigation on the waterway connecting care in the control of the property involved in this case from April 16 to 27, 1926, and from November 29, 1929, to January 13, 1930. In these dredging operations the defendant of the control of the c

In 1931 plaintiffs predecesor in title, with the permission of the Secretary of War, placed additional steel piling along the face of the existing piling bulkend for a distance of 128 feet wedward from the east boundary of the property in question. The failure or collapse of the woods per period of the bulkend following the 1937 dredging operations of the property in 1931.

proposed in 1937, following the letting by the defoundars of contracts for the dredging of numerous areas in the channel, the Government commenced dredging operations close to plantifile property, and on Norember 31 was found that cracks had developed in the coal yard land shoreward forced riverward. The drudge was immediately removed to a point in midstream where it continued operations. The land shoreward of the buildeed continued to crack and by November 18 the surface of the coal yard, where the break interest of the coal yard, where the break the coal was also the coal yard, where the break the coal was also the coal yard, where the break the coal was also the coal yard, where the break the coal yard, where the break the coal yard was also the coal yard, where the break the coal yard was also the coal yard, where the break the coal yard was also the coal yard, where the break the coal yard was also the proposed to the coal yard, where the break the proposed to the propos

and legal dimensions of the waterway, or exceed the reasonable needs of navigation. The level of the river was not and had not been raised or lowered by the United States or its agents.

From the foregoing it is clear that the defendant did not in any way encroach upon any property rights of plaintiff, and, under the facts disclosed, there is no justification for application of the principle of a constructive taking upon which to base an implied promise to pay just compensation under the Fifth Amendment, measured either by the value of the property or by the difference between the market value of the property before the wooden portion of the bulkhead collapsed and the market value thereof afterwards. The plaintiff acquired the property subject to the undeniable right of the United States to maintain a navigable waterway at the authorized depth and width. The damage to plaintiff's coal vard property was due to inadequate foundation support for the wooden bulkhead piling by reason of the age of the bulkhead, the natural effect of the water in the payionble channel, and the pressure on the bulkhead on the landside thereof. It is true that the bulkhead in part had been there since about 1900, and before the channel was dredged to the authorized depth and width along the property in question in 1907, but the United States was not a guarantor of the adequacy of the bulkhead. When plaintiff acquired the property it acquired it subject to the existing rights of the United States, and plaintiff did not acquire any right to prevent the United States from properly maintaining the navigable waterway or to compel it to answer for any damage that might result from collapse of the bulkhead by reason of proper maintenance of the waterway by the defendant.

The damage resulting to plaintiff's property was due to plaintiff's failure to maintain an adequate builknead. Such damage was not the result of the taking by the defendant of any property rights of plaintiff, and whatever effect the defendant's dredging operations may have had upon plaintiff's builknead, the resulting damage because of its collapse 219 Opinion of the Court was indirect and consequential to the exercise by the

defendant of a lawful power. Plaintiff relies chiefly upon the opinions in United States

v. Lynah, 188 U. S. 445, and United States v. Cress, 243 U. S. 316. But it is clear that the decisions in those cases, as explained and applied in United States v. The Chicago. Milwaukes, St. Paul and Pacific Railroad Company, et al., 312 U. S. 592, do not support the claim of this plaintiff under the facts disclosed.

With reference to plaintiff's other contention that it should be given judgment for the loss and damage sustained because the Government's dredging operations were carried on pursuant to an Act of Congress, it is sufficient to say that the Act authorizing the maintenance of this waterway did not assume any obligation to pay damages which might result to property owners, situated as was plaintiff, as a consequence of such maintenance operation. The claim cannot, therefore, be said to be one arising under a law of Congress. In order for this court to entertain a suit and enter judgment upon a claim arising under a law of Congress, the statute upon which the claim is based must grant the right asserted. The acts under which the dredging operations in 1937 and prior years were carried on clearly did not, expressly or impliedly, confer upon plaintiff the right to be compensated for damages, even if such damages had directly resulted from the authorized dredging operations by the Government within the limits of its

own property.

The plaintiff's petition and the petition of the intervenor will be dismissed and it is so ordered.

Madden, Judge; Jones, Judge; and Whaley, Chief Justice,

concur. WHITAKER, Judge, took no part in the decision of this case. MENOMINEE TRIBE OF INDIANS v. THE UNITED STATES

[No. 44294. Decided December 1, 1941. Defendant's motion for new trial overruled February 2, 19421

### On the Proofs

Indian claims: commensation for "evanus lands" under the treaty of 1854.-Where under the provisions of the treaty of May 12. 1854, the defendant gave to the plaintiff Indians for a home a tract of land mon Wolf River in the State of Wisconsin. definitely described by metes and bounds, and containing 12 specific townships; and where prior to the signing of said treaty the Congress had nossed what is known as the "Swamp Land Act of 1850," by the terms of which the swamp and overflowed lands of Arkansus and all other States, including Wisconsin, were granted to the several States; and where It is shown that there are swamp lands located within the boundaries of the reservation given to the Menominees by the trenty of 1854; it is held that the plaintiff is entitled to recover the acquisition costs of such lands which were within the boundaries of the cession to the plaintiff by the treaty of 1954 but which had been theretofore given to the State of Wisconsin by the act of 1850, together with the value of that portion of the timber which has been removed therefrom and for which plaintiff has not been paid; provided, however, in accordance with the terms of the jurisdictional act, that the United States "may in lieu of paying the present acquisition costs of such lands acquire and hold said lands in trust for the sole benefit and use of the Menominee Tribe of Indiana"

Beauty, contractual rights under treaty.—Where under the decident In Direct States v. Minonster, 2012. U. S. 131, the title to the swamp lands embresed in the reservation coded to the plaining property of the plaining of the plaining of the plaining granted to that Statis is presently by the set of 150s, subject only to identification by the Secretary of the Interfer and partner to be tended on the report of the Overnoria, in partner to be reserved to the plaining of the plaining of

the plaintiff and the defendant under the treaty of 1894.

Some.—The plaintiff Indians had purchased certain lands from the
United States, had paid a valuable consideration therefor,

Reporter's Statement of the Case said lands had been described by metes and bounds, and no reservation or evention and been made of any lands on

reservation or exception had been made of any lands embraced within the boundaries of said tract.

Same: Indian Treation liberally countried.—Treaties between the

United States and the Indian Tribes must be construed liberally in behalf of the Indians in view of the relationship existing between the parties.

## The Reporter's statement of the case:

Mr. Ernest L. Wilkinson for the plaintiff. Messrs. Dwight, Harris, Koegel & Caskey, Andrew E. Stewart, and John W. Cragun were on the briefs. Mr. Walter C. Shoup, with whom was Mr. Assistant Attor-

ney General Norman M. Littell, for the defendant. Mr. Raymond T. Nagle was on the brief.

The court made special findings of fact as follows:

1. This is one of the several suits brought pursuant to the Act of Congress approved September 9, 1005 (40 Stat. 1080), as amended by the Act of Congress approved April 7, 1008 (20 April 7,

\* \* including, but without limiting the generality of the foregoing, (1) a claim for damages for swamp lands which the United States allegedly purported to convey to the Menomines Tribe of Indians by a trestly ratified May 19, 1894 (10 Stat. L. 1994), but which the United States allegedly did not convey because of already having conveyed the same to the State of Wisconsin (9 Stat. L. 5199); \* \* \*

Staft L 5 191);
Sec. 6. (a) If it shall be determined by the court that
the United States in violation of the terms and provisions
of the treaty ratified May 12, 1854 (10) Staft, L 1964),
units whully failed to convey certain swamp lands to the
units whully failed to convey certain swamp lands to meet
in fayor of the Menomines Tribs of Indians fore,
sum equal to (1) the value of the timber removed therefrom since May 12, 1834, with interest at 4 or contam

Per annum from the time of such removal and (2) the present acquisition costs of such lands to the Menomineer Trile of Indians, which shall be determined by the court, with a proviso that the United States may in lieu of paying the present acquisition costs of such lands acquire and hold said lands in trust for the sole benefit and use of the Menominee Tribe of Indians.

The petition was filed on December 1, 1938.

2. By the treaty of October 18, 1886 (9 Stat. 592), plain-fill fudians codes, adol, and reliquished to defendant "all their lands in the State of Wisconin, wherever situated. In return therefore the defendant agreed to give to the Menominese for a home, all that tract of land ceded to the Menominese for a home, all that tract of land ceded to the United States by the Chippewas, in the treathest of August 2 and August 21, 1847, respectively, and Late Superior, and the Fillages band of Chipewas, in the treathest of August 2 and August 21, 1847, respectively, and the contract of the Chipewas, in the treathest of August 2 and August 21, 1847, respectively, and the contract of the Chipewas, in the contract of the Chipewas, in the contract of the Chipewas and the

As a further consideration the defendant agreed to pay \$250,00000 additional in the manner set out in detail in Article IV of said treaty, it being agreed that a portion of such sum should be used to pay the costs of removal, a year's subsistence, and other items named in Article IV, the balance of \$200,00000 to be paid to the Indians in ten equal annual installments.

Article VIII of the treaty provided that the Indians should be permitted, if they so desired, to remain on the lands ceded for and during the period of two years from the date of the treaty "and until the President shall notify them that the same are wanted."

3. An exploring party (contemplated by Article 6 of the treast of 1848), formed in 1850 to axplor the lands west of the Missispip, found the lands which had been coded to the Missispip, found the lands which had been coded to the Menonimes to be unsuited to their circumstances. Although the removal of the Menonimese from Wisconsin at the end of the two-year period fixed in the treasty of 1848 had been ordered, the Menonimes in 1850 petitioned the President for leave to stay longer.

8-percer's Statement of the Case
4. In 1850 the Congress passed what is known as the
"Swamp Land Act" approved September 28, 1850 (9 Stat.
519) which reads as follows:

Be it enacted by the Senate and House of Representties of the United States of America in Congress assembled, That to enable the State of Arkansas to construct the necessary leves and drains to reclaim the awamp and overflowed lands therein, the whole of these swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said

State. 2. And but by bribes emotted, That is shall be the duty of the Screenzy of the Interior, as soon as may be predictable after the passage of this set, to make out an emission and the set of th

Suc. 3. And be it further enacted, That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is "wet and unfit for cultivation," shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom

SEC. 4. And be it further enacted, That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known and designated as aforesaid, may be situated.

 By successive orders of the President, the time for the Menominees to remove from the lands in Wisconsin upon which they resided at the time of the treaty of 1848 was extended to October 1, 1802.

6. In view of the great reluctance shown by the Menominees to leave Wisconsin and take up their new lands west of the Mississippi, Elias Murray, Superintendent of Indian Affairs, was ordered by the Commissioner of Indian Affairs.

in June 1851 to make a full study and report of the condition of the Mononines. Subsequently, Mr. Murray explored in Suphember 1851 a northern location in Wisconsin for the Mononines Indiana, being lands on the Woff and Occuto resided. Three chiefs of the Mononinese accompanied Mr. Wisconsin for the Murray on the exploring party, which was by boat since there were no reads. The location explored and recommended by Mr. Murray was a trace 3 by 15 miles, to correspond with the public surveys, embracing Townships 88, 69, and 50 North, the Charles of the Charl

7. By treaty of May 12, 1884 (10 Stat. 1064), the Menominese ceded to the United States the lands west of the Mississippi River acquired by them by the treaty of 1849, and as a consideration therefor, the United States ceded to the Menominees for a home twelve townships of land in Northern Wisconsin as follows:

APTICE 2. In consideration of the foregoing cession to trining States agrees to give, and to hereby give to said Indians for a hones, to be held as Todion Inside are held, that tract of country lying upon the Wolf River, in the State of Wisconsin, commencing at the southeast corner of township Son orthof range of least of the fourth principal meridian, running west treenty-four miles, theness morth eighteen miles, there and twenty-four themses morth eighteen miles, there and twenty-four highest miles and the southeast continued to the same being townships 26, 29, and 20, of ranges 134, 14, 18, 24 fix, and 18, according to the public surveys.

8. In ceding the land described in Finding 7 to the Menonines the United States made no reservation of the awam lands that were included within the boundaries of the tract, nor was any reference made to them in the treaty. In fact, the then Commissioner of Indian Affairs, George W. Marypenny, in a latter of instructions to the Superintendent of Indian Affairs, dated April 5, 1684, stated that the control of Indian Affairs, dated April 5, 1684, stated that the code of the treaty of Indian Affairs, dated April 5, 1684, stated that the code of the Commission of th

Reporter's Statement of the Case

the treaty as indicated in the letter contained 23,040 acres each, or a total of 276,480 acres.

9. By the treaty of February 11, 1856 (11 Stat. 479), the Monomines Trible coded to the United States \*\* tract of land, not to exceed two townships in extent, to be selected in the western part of the present reservation on its south line, \*\* \* for the purpose of locating thereon the Stockholm as the United States may desire to remove to the and location within two years\* from the ratification of the treaty. Thereastire, the two townships in the southwestern the treaty. Thereastire, the two townships in the southwestern the treaty. Thereastire, the two townships in the southwestern the treaty of the southwestern the treaty of the southwestern the southwester

10. By Patent No. 8 Menasha Series, November 13, 1865, the United States formally granted to the State of Wisconsin swamp lands within the boundaries of the Menominee Reservation, as follows:

Township North	Bange East	Number of sores
2	33 23 24 24 15 25 25 25	790 2,080 600 1,580 130 2,672,5 4,981.0 3,741.0
Total		15, 276. 1

11. It is conceded by both parties that there are probably additional wamp land located within the trust coded to the Miscomines Indians by the treaty of 158-5. However, directions set out in the set approved September 28, 1850, supra, to "make out an accurate list and plats of the lands" (evamp lands) and no patent for such additional lands has been issued to the State of Wiscomin. The extent and located the supractice of the state of Wiscomin. The catent and located the supractice of the state of Wiscomin.

Reporter's Statement of the Case During the logging season of 1897-1898, the United States cut about 1.044,500 board feet of pine timber from lands patented to the State within the Menominee Reservation. The timber was sold by the United States for \$13.60 per thousand feet and in turn sold by the purchaser to one Hollister. The logs were replevied by the State of Wisconsin, which returned them to Hollister upon his giving bond to the State and to the United States. The United States and the State of Wisconsin appointed agents to scale the timber removed, who reported the cutting of the timber and its sale as above set forth; and the United States, through the formal action of the Secretary of the Interior, assented to the payment for the timber being made to the State of Wisconsin. instead of to the United States for the account of plaintiff Indians, as a result of which \$9,548.10, less \$4,667.10 for cut-

ting and banking, was paid to the State of Wisconsin.

13. The defendant on December 17, 1910, directed that no timber should be cut from lands patented to the State of Wisconsin as swamp lands within the Menominee Reservation.

14. Under date of February 28, 1930, the State of Wisconsin forwarded swamp land selection lists for lands within the Menominee Reservation consisting of (a) a list selected by the Commission composed of C. M. Foresman and H. C. Darragh (appointed by agreement between the Governor of Wisconsin and the Secretary of the Interior to investigate the claims of the State of Wisconsin to additional swamp land, the Commission making a report dated August 13, 1881, but upon which report the Secretary of the Interior took no further action) and totalling, as the State claimed, 4,403.03 acres in the following sections: Township 28 N., Range 16 E.; Townships 29 N., Ranges 13, 14, and 16 E.; and Townships 30 N., Ranges 13, 14, 15, and 16 E. (4th P. M.); and (b) a list (comprising lands selected by the agents of the State, Hubert Wyman and C. M. Foresman, on February 27, 1898) in the following townships: Township 28 N., Range 15 E., Township 29 N., Range 15 E., claimed by the State to total 6,591.66 acres. The Indian Office, at the suggestion of the General Land Office, filed a protest against action on the State's selections.

#### Opinion of the Court

15. A considerable quantity of timber has been removed from awamp lands lying within the boundaries of the present Menominee Reservation. Apparently in every instance, with the single exception mentioned in Finding 12, the proceeds from such timber have been paid to, or expended for, the benefit of the Menominee Indiano retrained by the Government pending the settlement of the syamp land centreway with the State of Wisconsin. From June 30, 190, to June 30, 190, to the whole of the way of the State of Wisconsin, State of Wisconsin, and that anomat was deposited in the Treasury of the United States to the credit of the Menomine Fribe with other revenues from timber operations.

16. In 1938 representatives of the Secretary of the Interior and of the State of Wisconsia agreed that the State would sell to the United States, on behalf of the Indians, the swamp lands and timber thereon at a price agreed upon. Congress, however, has not appropriated the necessary tunds for carrying out such agreement, and the agreement has, therefore, never been consummated.

The court decided that under the terms of the jurisdictional act the plaintiff was entitled to recover; subject, however, to the deduction of off-sets, if any, and reserving the determination of the amount of recovery and the amount of off-sets, if any, for further proceedings, as provided in Rule 39 (a) of the court.

#### Jones, Judge, delivered the opinion of the court: The Menomines Tribe of Indians instituted this suit to re-

cover the acquisition costs of swamp lands located within the borders of the reservation which was coded to it by the defendant under treaty. It also seeks to recover the value of the timber removed by the defendant from such swamp lands since the date of the treaty, May 12, 1884 (10 Stat. 1004).

Prior to the negotiation of the treaty which forms the basis of this suit, the plaintiff tribe of Indians had "ceded, sold, and relinquished" to the defendant all its lands in the State of Wisconsin wherever situated, and the defendant had agreed to give to the plaintiff Indians another tract of land and certain sums of money. Opinion of the Court

After considerable investigation and exploration the treaty

After consideration investigation and exploration for treaty of May 12, 1984, supra, was entered into. By the terms of Article 2 of such treaty the defendant gave to the plantiff Indians for a home a tract of land upon Wolf River in the State of Wisconsin, definitely described by metes and bounds, and containing 12 specific townships.

Prior to the signing of such treaty the Congress had passed what is known as the "Swamp Jand Act" of 1850 (9 Stat. 519), by the terms of which the swamp and overflowed lands lying in the State of Arkansa were granted to that state, the lands to be identified and listed by the Secretary of the Interior, and patent to be issued upon request of the Governor of that state. The less stipulated that its provisions thould be and they were extended to all the other states.

There are swamp lands located within the boundaries of the reservation which was given to the Menominees by the treaty of 1854.

The question is whether the plaintiff is entitled to recover for these lands which were within the boundaries of the cession to the plaintiff by the treaty of 1884, but which had been theretofore given to the State of Wisconsin by the act of 1880, supra, to be listed, identified, and patented in the manner indicated.

We think the so-called "swamp lands" were included in the lands ceded to the Menominees for a home by the treaty of 1854, and that plaintiff is entitled to recover under the jurisdictional act.

The lands conveyed to the Indians are definitely described by metes and bounds in the treaty of cession. The tract of land, when all the acreage is included, is less than the tract which the Indians had surrendered.

The basis, the background, the previous history, and the negotiations leading up to the treaty show that the Indians were desirous of securing hunting lands and that the swamp lands were particularly suited for this purpose, being filled with all kinds of game.

Under direction of the Commissioner of Indian Affairs, Elias Murray, Superintendent of Indian Affairs, made a full study and reported on the condition of the Menominess in 1851. He reported that the Indians were "highly satisfied

Opinion of the Court with the location I have recommended," He made special

reference to the swamp areas and to the fact that "Bears, Foxes, and Martins appear to inhabit these Swamps." The interpreter who accompanied the party and who was told to explore the area east of the Wolf River in the company of the Indian chiefs, reported that they had "found a number of Cedar and Tamarack swamps where are many signs of Bears, deer, and other games" and that "the chiefs are highly

pleased with the Country and say they hope the President will give it to them for a home," While the survey covered a larger area than was finally ceded to the plaintiff tribe, it was in the same general sec-

tion of the country and included most of the territory that was finally ceded by the treaty of 1854. These facts are mentioned to indicate that a part of the

inducement for the moving of the Indians from their former home to their new home, and one of the reasons for entering into the new treaty was the fact that the tract in question contained swamp lands which were suitable for hunting.

When this is followed by a treaty which without reservation definitely transfers by metes and bounds a tract that is smaller than they had formerly owned, and which was based upon a letter of instructions from the Commissioner of Indian Affairs stating that it contained 276,480 acres, which was the exact acreage contained within the 12 townships including all the swamp lands, as well as all other lands, it becomes manifest that the contract included all the lands within the boundaries specified in the treaty.

In 1993 the United States, in behalf of the plaintiff tribe of Indians, filed suit against the State of Wisconsin to cancel the patent relating to swamp lands within the Indian reservations, including that of the Menominees, and to remove the cloud on the title of the Indians.

In the same year a similar suit was brought against the State of Minnesota. In that case, United States v. Minnesota. 270 U.S. 181, the Supreme Court held that the State of Minnesota had taken title to the swamp lands by the act of 1850. and that the inclusion of such lands within the boundaries of the tract described in the subsequent treaty of cession did not operate to convey the legal title to the Chippewas.

Opinion of the Court

The defendant relies upon the decision in the latter case to support its contention that since the swamp lands had actually been transferred by the act of 1859, subject only to identification and patent as such, the plaintiff tribe had acquired no interest therein and the defendant had incurred no obligation relative thereto by the treaty of cession.

After the decision in the Minnesota case the defendant dismissed its suit against the State of Wisconsin.

There is no doubt that under the decision in the Minnesota

There is no doubt that under the decision in the Minnesota sets the tile to the swimp lands embraced in the reservation ceded to the plaintiff tribe in 1854 is now in the State of Wristmann and the property of the three controls of the three controls of the control 1850; the property of the three controls of the control 1850; the control 1850 is the control 1850 i

Under the terms of that decision neither the Indians nor the United States on behalf of the Indians could maintain a unit against the State of Wisconsin for the legal title to the swamp anda in question. However, this does not touch upon the conmitted to the swamp and the same that the state of the state Whether or not a suit could be maintained for the legal title to the swamp lands in question, the fasts remain that the plaintif Indians had purchased certain lands from the United States; that they had plaid a valuable consideration therefor; that the land had been described by meets and bounds; and embraced within the boundaries of the tract.

While there is some language in the Minnesota decided which would und to indicate that lands theretofore remferred wave not included within the treaty of cession, even the content over the language of the content of the content wave the legal tide and the statements were made as bearing on the question of whether the United States or the State of Minnesota had the legal title not hand. It in no seems touched upon the obligation which the United States owned the plaintiff Indians under the terms of the treaty of Oninian of the Court

The very fact that the United States saw fit to file suit in behalf of the Indian sagainst the State of Wisconsin to cancel the title to the swamp lands is a strong indication that the Government recognized its obligation to the Indians in connection with such swamp lands; in other words, it had conveyed such lands to the State of Wisconsin by the set of 1850, and had again undertaken to convey the same lands to the Indians by the treaty of 1854.

It is not necessary to discuss the relationship existing between the defendant and the various Indian tribes. This has been discussed repeatedly and it is well settled that treaties must be construed liberally in behalf of the Indians, in view of the relationship which exists between them and the defendant.

and reactioning votars can between tension in the uncertainty. Considering the events and transactions leading up to the relativistic Sec., as well as the test of the treaty itself, the relativistic Sec., as well as a the test of the treaty itself, the relativistic Sec., as well as the second of the relativistic Sec., as well as the relativistic Sec., as well as the relativistic Sec., as well as the second of the relativistic Sec., as well as the second of the

Only 15,276.14 acres have actually been patented to the State of Wisconsin. Defendant insists that recovery in any event should be limited to the acquisition costs of this definite acreage. We do not think so.

It is conceded that there are additional evamp lands within the reservation. At different times two lists were filled with the Secretary of the Interior, one by a joint commission appointed by the Governor of the State of Wisconsin and the Secretary of the Interior, and the other prepared by officials of the State of Wisconsin. The State of Wisconsin has repeatedly demanded a patient to these inands. Whether the failure of the Secretary of the Interior to perform the purely ministerial dirty of designation was due to an effort ferred to the State of Wisconsin by the Act of 1850, or for some other reason, is not clear. When he fails to perform such a duty it does not defeat the purpose of the sec. As was stated by the Supreme Court in the case of Wright v. Resolvery, 121 U. S. 488, 506, in which a similar question affecting swamp lands was involved, "when that office has neglected or failed to make the identification" it is proper "to identify the lands in any other appropriate node which will effect that object." Several efforts to adjust the matter have been made, including an agreement between the proper state officials and the Secretary of the Interior for a sale and transfer by the State of Wicconsin to the land of the state of the Secretary of the Interior for a sale and transfer by the State of Wicconsin to the land of the state of the Secretary of the Interior for a sole and transfer by the State of Wicconsin to the land of the state of the Secretary of the Interior It is a continuing source of irritation. There should be an end to the controvers.

The jurisdictional act is broad. It directs the Court of Claims to investigate and, if it finds that the United States unlawfully failed to convey certain swamp lands to the plainiff, to resider judgment for the sequisition costs thereof. The identification of the lands is a necessary incident to determining the sequisition costs of such lands. Solidently determined to the sequisition costs of such lands. Solidently about the brought to a conclusion. Under Rule 39 (a) an interlocutory order is better entered.

reserving the determination of the amount of the recovery and the amount of offsets, if any, for further proceedings.

Madden, Judge; Whitaker, Judge; Littleton, Judge; and Whalet, Chief Justice, concur.

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY v. THE UNITED STATES

[No. 43654. Decided December 1, 1942. Plaintiff's motion for new trial overruled March 2, 1942]

## On the Proofs

Interest on allowed closin; payment selfabeld by Comprible General as off-set to amount alloyed to be due to Government—Pere amounts allowed by legal authority and admittedly due to plaintiff for transportation nervices received by plaintiff for transportation nervices received by plaintiff to Government were withheld by the Comprivative General to apply against an alleged indebtoness or the plaintiff to the United

## Syllabus

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States under an order of the Interestate Commence Commentee in connection with a proceeding before the Commission Interesing the determination of excess income of plaintiff for the order of the Commission of the Commission Interestant Commission of the Commission Interest Commission Interest desired any Indebtodeness to the United States in respect to the aid determination of the Commission and did not consent to said offset by the Commission Interest and these to pulgement was ever rendered with rangel to the assume an determination are considered to the Commission Interest under the Commission Interest under the aid renowd, is not cuttled to recover any interest under the six of March 3, 1876, to the before or after united was weare the six

Berne, Benefren, Die Stelle St., 1988. On der der der WestBerner, Benefren, Bullowal Fransparietion det of 1838.—The decifies by Congress in the exactions of the "Sucrepasory Baltimate
d'Evasportation Act" of June 38, 1003, to ammed section 1844.
(b) of sald section, and to direct that all moster proversals
(d) of sald section, and to direct that all moster proversals
and purphis to the Internation Commence Commission under said
section. Sas should cease to be no recoverable and purphis and
data dis proceedings predifing for the receivery of sends instorpe
data dis proceedings predifing for the receivery of sends instorpe

States within the meaning of the Act of March 8, 1875, that plaintiff was not, up to that time, indebted to the United States under section 15a (8) of the Act of 1520.

Some, indirect delicated applies according.—The common law rule that delay or default in payment (upon whick, in the absence of an express agreement, the right to recover interest resist) cannot be attributed to the sovereign has been adopted by the Concrete.

Some.—Interest is not to be awarded against a sovereign government unless its consent has been manifested by an act of its legislature or by a lawful contract of its executive effects.

Some.—The right to claim and recover interest from the United States is purely a matter of grace and all the stipulated conditions upon which the United States has agreed to pay the interest, or to become liable therefor, must be strictly met.

Remer, effect of decision of Court of Aspeals in prior rest.—In the unit instituted against the Completeller General by the pilabellif for an injunction retrievable to Countrieval Countr

The Reporter's statement of the case:

Reporter's Statement of the Care Mr. Carl H. Richmond for the plaintiff. Mr. E. Randolph Williams was on the brief.

Mr. John B. Miller, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant.

Plaintiff seeks to recover \$49,449.31 under the Act of March 8, 1875, U. S. Code Supp., Title 31, section 227, as amended by the Act of March 3, 1933, representing interest at 6 per centum per annum on amounts allowed by legal authority and due plaintiff for transportation services performed for the Government, including transportation of mail, passengers, and freight, which sums so accrued and so allowed were withheld by the Comptroller General on and after August 4, 1981, and prior to March 3, 1983, to apply against an alleged indebtedness of \$696,705.68 of the plaintiff to the United States under an order of the Interstate Commerce Commission, 170 I. C. C. 451, in connection with a proceeding before the Commission involving the determination of excess income of plaintiff for the calendar years 1922 and 1923 under section 15s, psr. 6, of the Transportation Act of February 28, 1920, 41 Stat. 488.

In the alternative, plaintiff seeks to recover \$35,821.78, representing interest at 6 percent from the dates of withholding of the amounts due plaintiff, as aforesaid, until March 3, 1933, on which date Congress amended the Act of March 3, 1875, so as to condition the payment of interest only upon the withholding of payment of the final judgment recovered against the United States rather than, as provided in the original act, upon the withholding of any judgment against the United States, or other claim duly allowed by legal authority.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The plaintiff at all times with which this proceeding is concerned was a Virginia corporation operating as a railroad common carrier in interstate commerce.

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Reporter's Statement of the Case
All exhibits in this case are part of the stipulation filed
therein, and where referred to herein are made a part hereof
by reference.

2. The principal issue in this case is plaintiff's right to interest on moneys due it for services rendered to the Post Oct and the Covernment of the Post of the Covernment of the Post Oct and the Covernment of the Post of the Covernment of the Post Oct of the Covernment of the Post of the Post of the Post of the plaintiff for the years 1928 and 1928, which excess income to Interestate Commence Commission sought to receive in 1831 and the plaintiff refused to pay, as her-singfer set out. This issue involves interpretation of the Act of March 50 (3 IU. S. C. 287), both before and after it was amended by the Act of March 3, 1398 (48 78 to 1488, 1189).

3. April 7, 1981, over plaintiff's motion fo veacts on the ground that the term of the Commission's jurisdiction under section 15a (6), Act of February 28, 1920 (U. S. C. A., Title 49, section 15 (a)), had expired, the Interstate Commerce Commission in proceedings on the excess income of plaintiff, and and the commerce of the commission of plaintiff, and also in Eachibit A., made its elsermination and order under section 15a (6) of the Act of February 28, 1920 (4). Stat. 489.) a pertinent paragraph of which reads as follows:

It is ordered. That the amounts of zeros not rullway operating income which are held by the said Richmod, Frederichburg and Potence Railrod Company as treates for the Juniel States, under the aforesaid proving the said and the

The amounts sought to be recovered for the years 1922 and 1923 total \$696,705.68. 4. The plaintiff died not pay to the Interstate Commerce Commission the sum of \$800,700.88, with interext, within interty days as it was directed to do by the order of April 7, 1981, referred to in the preceding finding. On July 28, 1981, the Chairman of the Interstate Commerce Commission transnited a letter (Exhibit B) to the Comptroller General of the United States, in which, after discussing procedure to recover the excess income from plaintiff, incontinued as

In view of these circumstances, the Commission had circeted me to call to your attention the fact of the issuance of the order and that the same remains unchallenged by the carrier in any direct proceeding, in order that you may take under advisement the desirability and the propriety of off-setting against the carrier's indebt-exhes to the United States under this order any suns formed by it for the United States.

The Commission before taking any further proceedings in the matter will await advice from you as to the

course which you deem it proper for your office to take. In view of the desirability that the Commission determine its course without undue delay, it will be appreciated if your office will expedite the consideration of its course of action, so far as is practicable.

 August 4, 1931, the Comptroller General transmitted a letter (Exhibit C) to the Interstate Commerce Commission, a pertinent paragraph of which reads as follows:

In order to protect amounts otherwise due from rulroad companies to the United States this effect requently has resorted to the means of withholding from payment to such curriers earnings from mail, passenger and freight transportation, otherwise due in such cases, fully protected or the carriers had failed to liquidate their indebtedness when called upon to do so, and no reason appears why, in the present matter, the same cases appears why, in the present matter, the same amounts stated in your letter have been certified by your Commissions ad due the United States under section 15a of the Interestate Commerce Act, as amended, of your Commissions. Infall of comply with the order of your Commissions. On the same day (August 4, 1931) the Comptroller General transmitted a letter (Exhibit D) to the plaintiff, the

last paragraph of which reads as follows:

In view of the apparent failing of the carrier to liquidate its indebtedness as found due the United States by order of the Interestate Commerce Commission. I have to advise that all earnings of the Kellmond, Frederickshops and Hotomose Lairnest Company for Prederickshops and Hotomose Lairnest Company for including mail, passenger and freight transportation, hareafter accuraging will be withducted by this office for application against the indebtedness until a sufficient sufficient paragraph of the production of the control of the production and the control of the control

indebtedness.

6. August 7, 1931, the plaintiff replied to the letter from the Comptroller General, referred to in finding 5, protesting the action of the Comptroller General. Plaintiff's letter

(Exhibit E) reads in part as follows:

We respectfully protest against your action in this matter and insist upon our right to receive the moneys, the amounts of which are not in dispute, due us for services rendered to the Post Office or other Departments.

The alleged indebtdenes of the Bailroad not having been judically ascertained or legally defined nor freed and being denied in too by the Bailroad, and, we subsuit, lawfully be set up by you against moneys extended to the set of th

7. On August 4, 1981, there had been presented to the Comptroller General for payment, and thereafter from time to time prior to March 3, 1983, there were so presented, claims for transportation services rendered by plaintiff to defendant which had been duly considered and allowed by legal authority and approved for payment by the administraitive departments and agencies concerned, and the Comptrollier General withheld payment of the allowed and appropriate of the property of the subsequence of April 7, 1931 (Eschibit A), until sufficient funds should accumulate to pay the said amount, except interest. The total of the amounts deep laintiff, and upon which interest is claimed, was \$1.976 (10 Stat. 431), before it was amended by the Act of March 5, 1933 (U. S. C. Supp., Title 81, sec. 297). Interest of person pre-amount on the total amounts on without of the dates of withholding until March 5, 1959, as \$85,9217 as of the dates of withholding until March 5, 1959, as \$85,9217 as of the dates of withholding until March 5, 1959, as \$85,9217 as of \$85,000 for the control of the con

8. November 11, 1931, the plaintiff commenced an action against the Comprolled General in the Supreme Court of the District of Columbia entitled Richmond, Frederichiology & the District of Columbia entitled Richmond, Frederichiology & that the Comprolled General he enjoined from such with holding. The suit was dismissed February 23, 1932, on more on of defendant, and plaintiff appealed therefrom to the Court of Appeals for the District of Columbia, which court on November 21, 1939, repredent led sections reported in 62 insurprocessing the control of the columbia of the columbia issue preading determination of the action commenced on July 5, 1932, referred to in finding on.

3. July 5., 1939 (grier to the decision of November 2), 1932, referred to finding 8), the United States commenced an action against plaintiff in the Supreme Court of the District of Columbia. The Interestant Commerce Commission intervened therein as a party plaintiff. In this case the United States sought to enforce and reduce to final judgment (Julied States sought to enforce and reduce to final judgment 7, 1961, referred to in finding 3, and to recover \$695,000 and interest which the Interestate Commerce Commission and ordered paid. By sections 265 and 290 of the Act of June 1, 1983, 48 State 211, 290, Congress sameded Section 188, 1711 e 39, U. S. C., repealed paragraph (9) thereof, and as follows:

Reporter's Statement of the Case

(a) All moneys which were recoverable by and payable to the Interstate Commerce Commission, under paragraph (6) of section 15a of the Interstate Commerce Act, as in force prior to the enactment of this title, shall cease to be so recoverable and payable; and all proceedings pending for the recovery of any such moneys shall be terminated. The general railroad contingent fund established under such section shall be liquidated and the Secretary of the Treasury shall distribute the moneys in such fund among the carriers which have made payments under such section, so that each such carrier shall receive an amount bearing the same ratio to the total amount in such fund that the total of amounts paid under such section by such carrier bears to the total of amounts paid under such section by all carriers; except that if the total amount in such fund exceeds the total of amounts paid under such section by all carriers such excess shall be distributed among such carriers upon the basis of the average rate of earnings (as determined by the Secretary of the Treasury) on the investment of the moneys in such fund and differences in dates of payments by such carriers.

10. After the repeal of paragraph (6) of section 15a of the Act of February 28, 1920, and the enactment of section 206 (a). Act of June 16, 1933, and while the action in the Supreme Court of the District of Columbia, referred to in finding 9, was still pending, the plaintiff herein and the defendant in said action on June 27, 1933, filed a motion (which motion was consented to by both the United States and the Interstate Commerce Commission) to dismiss the suit, as follows:

Whereas Section 205 of the Emergency Railroad Transportation Act, 1933, approved June 16, 1933 (Public No. 68, 73rd Congress), has amended Section 15a of

the Interstate Commerce Act by repealing the provisions of said section upon which the above-entitled cause is based: Whereas Section 206 (a) of the Emergency Railroad

Transportation Act, 1933, provides in part as follows: "All moneys which were recoverable by and payable to the Interstate Commerce Commission, under paragraph (6) of section 15a of the Interstate Commerce Act, as in force prior to the enactment of this title, shall cease to be so recoverable and payable; and all proceedings pending for the recovery of any such moneys shall be terminated."

And whereas the above-entitled cause is a proceeding, inter alia, for the recovery of moneys payable to the Interstate Commerce Commission under paragraph (6) of Section 15a of the Interstate Commerce Act, as in force prior to the enactment of the Emergency Railroad

Transportation Act, 1983;

Now comes the defendant and moves the court to dismiss the above-entitled cause, without costs to any party.

On the same day, to wit, June 27, 1933, the Supreme Court of the District of Columbia entered an order (Exhibit Q) dismissing the suit.

11. There has been no judgment against the United States within the meaning of the Act of March 3, 1875 (38 Stat. 481), or that Act as amended by the Act of March 3, 1836 (18 Stat. 481), or that Act as amended by the Act of March 3, 1838 (18 States), or the Act of March 3, 1838 (18 States), or the Act of March 3, 1838 (18 States), or the Act of March 3, 1838 (18 States), or and prior of the Act of March 3, 1839 (18 States), or and prior agree that plaintiff was not so indekted on and prior to that date. The amount which had been withheld was paid to plaintiff as promptly as practicables feef aura to 18 States.

12. June 19, 1933, plaintiff wrote a letter (Exhibit R) to the Comptroller General, a pertinent paragraph of which reads as follows:

I understand from your office that appropriations are now available with which to gar the principal are now available with which to gar the principal terest thereon, and am further advised that you are not prepared at this time to concede the right of the Ratinot and of the immediate financial needs of the Ratinot Comparty 1 beg to ask that you promptly read that the read of the read of

June 26, 1933, the Comptroller General wrote a letter (Exhibit S) to plaintiff, two paragraphs of which read as follows: In reply I have today given instructions for the re-

In reply I have today given instructions for the release of said earnings and the bills will be settled in

# 244 Onlines of the Court

due course as promptly as the work of this office may

permit.

With respect to the statement in your letter that the

company wishes to reserve its right to claim interest upon the amounts withheld over the period of such withholding, it may be stated that no interest occurse upon amounts which have been withheld by this office on account of indebtedness to the United States, there being no law allowing the payment of such interest. \* \*

13. Between June 27 and July 14, 1933, the Comptroller General paid to plaintiff the principal amounts of its earnings previously withheld by him as hereinbefore stated, but did not pay any interest thereon.

14. If plaintiff is entitled to interest on the amounts withheld at the rate of 6 percent per annum, the interest at such rate until March 3, 1933, totals 385,821.78, and such interest to the dates of payment on the amounts withheld totals \$49,449.31.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, Judge, delivered the opinion of the court:

If plaintiff is entitled to recover interest on the amounts due it and allowed by legal authority and withheld by the Comptroller General, the amount due it is \$35.821.78. Whitbeck. Receiver of L-W-F Engineering Co., Inc., v. United States, 77 C. Cls. 309; Chicago, Indianapolis & Louisville Railway Co. a Corporation, v. United States, 78 C. Cls. 96. (Certiorari denied, 290 U. S. 671, in each case,) Plaintiff contends, however, that these decisions did not correctly interpret and apply the Act of March 3, 1875, after it was amended March 3, 1933, and insists that the act as it stood before the amendment continued after amendment to require the payment of interest at 6 percent until payment of any sum allowed by legal authority and withheld prior to the amendment and continued to be withheld thereafter. The amount of such interest subsequent to March 3, 1933, on amounts due plaintiff and allowed by legal authority prior thereto (during the period such amounts were withheld after March 3, 1983), is \$13,627,53.

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Opinion of the Court On the other hand counsel for defendant renews the contention long ago made and denied by this court, that the original Act of March 3, 1875, prior to the amendment thereof on March 3, 1933, did not authorize the allowance and payment of interest on any sum due to a claimant from the United States, unless and until that claim had been reduced to judgment and thereafter withheld. The defendant next renews the contention made and denied in Whithack v. United States, supra, and Chicago, I. & L. Ru, Co. v. United States. supra. that the Act of March 3, 1933, amending the Act of March 3, 1875, extinguished all claims and right to interest on amounts due the claimant and allowed by legal authority and withheld prior to March 3, 1933, as offsets against claims of the Government against the claimant. Finally, the defendant says that if plaintiff is entitled to recover any interest under the Act of 1875 no interest was payable or recoverable after March 3, 1933, on amounts theretofore allowed and withheld

In the circumstances of this case, we do not find it necessary to re-examine the first contention made by plaintiff or the first and second contentions made by the defendant for the reason that we are of opinion that plaintiff is not entitled under the facts disclosed by the record to recover any interest under the Act of March 3, 1875, either before or after that act was amended on March 3, 1933. Plaintiff denied any indebtedness to the United States in respect of the computation and determination made by the Interstate Commerce Commission under section 15s. (6) of the Transportation Act of 1990 and did not consent to the set-off by the Comptroller General of amounts otherwise due and determined to be due plaintiff by the United States. The last portion of the Act of March 3, 1875 (18 Stat. 481), as amended, pertinent to this phase of plaintiff's claim (the words in brackets were in the original act but were excluded in the amendment of March 3, 1933) provided as follows:

But if such plaintiff [or claimant] denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment for claim], as in his opinion will be sufficient

## Opinion of the Court

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to cover all legal charges and costs in prosecuting the debt of the United States to final judgament. And if such debt to the United States to final judgament. And if such debt troiler General of the United States to cause legal proceedings to be immediately commenced to enforce in special properties. The states of the states of the properties judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United be less than the amount so withheld as before provided, the behavior of the states of the states of the states of the provided the balance shall like the post off over 1 onesh planniff by per centum interest thereon for the time it has been withled from the plantiff.

The facts show without dispute that no judgment was ever rendered with reference to whether or not the amount of 800,000.86 determined by the Interestat Commerce Commis-States. Suit had been instituted by the United States against plasniff in the Supreme Court of the District of Columbis to recover this amount but no hearing thereon was had up to the time that Congress, on June 16, 1953, amended section 18 of the Act of February Si. (So), and repeated section 6

All moneys which were recoverable by and payable to the Interstate Commerce Commission, under paragraph (6) of section 15a of this chapter, as in force prior to June 16, 1933, shall cease to be so recoverable and payable; and all proceedings pending for the recovery of any such moneys shall be terminated. The general railroad contingent fund established under such section shall be liquidated and the Secretary of the Treasury shall distribute the moneys in such fund among the carriers which have made payments under such section, so that each such carrier shall receive an amount bearing the same ratio to the total amount in such fund that the total of amounts paid under such section by such carrier bears to the total of amounts paid under such section by all carriers; except that if the total amount in such fund exceeds the total of amounts paid under such section by all carriers such excess shall be distributed among such carriers upon the basis of the average rate of earnings (as determined by the Secretary of the Treasury) on the investment of the moneys in such fund and differences in dates of payments by such carriers.

The provisions of paragraph 6 of section 15a of the Interstate Commerce Act of February 28, 1920, 41 Stat. 488, were as follows:

If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory Act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4).

The quoted provisions of section 506 (a) and other change made in section 15a of the Act of 1950 by the Emergency Railroad Transportation Act of 1953, 48 Stat 211, are discussed and explained in Report No. 183, 753 Congress, 1st Session, of the Committee on Interestate and Foreign Comnerce of the House of Representatives, at pp. 27–30. The Committee said in part, p. 38

By this bill it is proposed to strike out the whole of section 15a and substitute therefor what may be termed a rule of rate making, indicating certain factors which, among others, the Commission, in the exercise of its power to prescribe just and reasonable rates, must take into consideration.

The bill provides (sec. 206) for the return to carriers

of amounts which they have heretofore paid to the Commission under the provisions of section 15s. Such 244

nomine placed in the railroad contingent fund, have been leveled in the railroad contingent fund, have been leveled in the railroad contingent fund, have been leveled that upon the railroad contingent fund for the railroad continue with the provisions of section 18a. It is expected that, upon lequidation of the fund, amounts earned with bring the frand up to a point where it is in excess earned to be really as the railroad of the railroad control of the rail

## been in the fund. And further, at p. 29:

This section 15a is a unique prevision in the public regulation of railroads and utilities in this country. When the Transportation Act was drawn in 1290 this Commission, nor from the railroads, nor from the ship-pers, but appears to have originated with some group which was appearedly dominated by a single individual with the same of the country of

The experience of the past 12 years bears out the correctness of the position taken by the committee in 1919. The rule has been disappointing to the security owners who thought they would profit from it. The shippers have never favored it, and the Interstate Commerce Commission has consistently and earnestly recommended its reneal.

See also Report No. 87, 78d Congress, 1st Session, of the Committee on Interstate Commerce of the Senate, May 15, 1983, pp. 11 and 12.

From the foregoing it is clear that there has never been a determination by judgment or otherwise that plaintiff was not in fact or in law indebted to the United States in whole the property of the state of the state of the state of the 15 (6) of the Interstate Commerce Act of 1909, super. The decision by Congress in the Emergency Baltierad Transportation Act of Jun 16, 1938, to a numed section 156, and repeat subsection (6) thereof, and direct that all money commerce Commission under paragraph (6) of the original section 15a as in force prior to June 16, 1933, should cease to be so recoverable and payable, and that all proceedings pending for the recovery of any such moneys should be terminated, was not a judgment against the United States within the meaning of the Act of March 3, 1876, that plaintif was not, up to that time, indebted to the United States under section 15a (6) of the Act of 1920.

The termination of the right to collect amounts due under the prior statute of 1920 in all proceedings for that purpose pending was a matter of policy. Had paragraph (6) of section 15s been simply repealed, plaintiff's liability thereunder prior to the repeal would not have been affected in view of the provisions of section 13 of the Revised Statutes, U. S. Code, Title I, section 29, that the repeal of any statute shall not have the effect to release or extinguish any liability incurred under such act unless the repealing act shall so expressly provide, and that such statute shall be treated as still remaining in force for the purpose of sustaining any proper action for the enforcement of such liability. The language of section 206 (a) of the Act of June 16, 1933. shows that in its enactment Congress was proceeding on the theory that unpaid amounts which had theretofore been determined by the Interstate Commerce Commission under the 1920 Act were due or recoverable in whole or in part, rather than that no indebtedness to the United States existed in respect thereof.

After enactment of sections 205 and 206 of the Emergency Railroad Transportation Act of June 16, 1933, the Government on June 27 filed a motion in the pending suit against plaintiff to dismiss the suit under section 206 (a) of the 1933 Act. The motion was allowed and the suit was dismissed by the court on the same day.

Insumed as there does not exist in this suit one of the conditions upon which the United States consented to pay interest or to become liable therefore on amounts withheld under the Act of March 3, 1875, to wit, a judgment against the United States in respect of the claimed indetechnes due the United States or its equivalent, an admission that the plaintiff was not indebted to the United State during the

period of withholding, no interest is payable or recoverable

by plaintiff under the Act of 1875. The common-law rule that delay or default in payment, (upon which, in the absence of an express agreement, the right to recover interest rests), cannot be attributed to the sovereign has been adopted by the Congress. United States v. North American Transportation & Tradina Company, 253 U. S. 330. Interest is not to be awarded against a sovereign government unless its consent has been manifested by an act of its legislature or by a lawful contract of its executive officers. United States v. North Caroling, 136 U. S. 210. The right to claim and recover interest from the United States is purely a matter of grace and all the stipulated conditions upon which the United States has agreed to pay the interest, or become liable therefor, must be strictly met. Tillson v. United States, 100 U. S. 43, 47; Harrey v. United

U. S. 251; Cherokee Nation v. United States, 270 U. S. 476; section 177, Judicial Code, U. S. Code Title 28, section 284. Hind v. United States, 70 C. Cls. 288, 293, The fact that plaintiff denied liability for the whole or any part of the amount determined by the Interstate Commerce Commission to be due and protested the withholding by the Comptroller General of amounts otherwise admittedly due plaintiff and the applying of same as an offset against the alleged indebtedness to the Government is not alone sufficient to entitle plaintiff to interest under the Act of 1875. Nor

States, 113 U. S. 243; U. S. ex rel Angarica v. Bayard, 127

is it of any controlling importance that plaintiff instituted a suit against the Comptroller General for a permanent injunction restraining him from withholding certain moneys due the plaintiff and applying same to the payment of an amount alleged to be due by plaintiff to the Interstate Commerce Commission, and obtained a favorable decision in such suit in the Court of Appeals for the District of Columbia November 21, 1932 (62 Fed. (2nd) 203). The question whether plaintiff was indebted to the United States. as claimed, was not considered or decided by the court. At the time the appeal was taken the United States had not in-

stituted suit against plaintiff to recover the alleged indebted-

The court of the measurement of the determination of the Interests of the Interest of Inte

Here, as we have seen, the services appellant rendered the United States are admitted. The amount due therefor is not contested, and so we have a case in which the United States owe appellant money which the Comptroller General refuses to pay because of an unsettled and unliquidated claim of the United States against appellant. This may not be done. There is, however, a statute of the United States which provides a right and a remedy. It authorizes the United States to withhold payment in any case in which an allowed claim is presented to the Treasury for payment (and appellant's is such a claim) where the United States has a counterclaim, until suit can be instituted on the counterclaim and pressed to final judgment. Act Mch. 3, 1875, c. 149, 18 Stat. 481; Tit. 31 U. S. C. A., sec. 227. This statute, we think, was the chart which should have guided the Comptroller General in the procedure to be taken in this case, for otherwise we should have to concede to that officer the power of determining and settling an indebtedness of a citizen of the United States without trial, the examination of witnesses, or the other safeguards of judge and jury which in our system of government are guaranteed. Had the United States in the first instance availed themselves of the right and remedy provided by the statute, the delay of a year which has resulted would have been avoided, and the rights of the parties as between themselves would likely have been settled without further recourse to the courts.

Following this the court referred to the contention of the Comptroller General that there was no obligation on the United States to press the order of the Commission to judgment but a duty on the railroad, if dissatisfied with the order of the Interstate Commerce Commission, to resort to a threejudge court in an effort to have it set aside, or to the Court of Claims to recover judgment against the United States for the withheld amount of indebtedness of the United States to the Railroad Company. The court said:

We are not impressed with this position in either nespect. That room to applicate to a three-judge court was open to it to question in order solely to pay money, return to the contract of the contract of the contractive. Forces there is proposed position of the executing, appellant was under no legal obligation to have it reviewed until it was sought one effects sign and the way to be a solely of the contract of the contract of the Appellant was audien nothing more than the payment of an admitted box. Appelles cought to vool payment on a destination of the contractive that the contractive of duty of establishing the counterchain and the legality of the set of was therefore, in the circumstances, an obliga-

In conclusion the court held that at the original hearing in the trial court that court should have required the Comptroller General to elect whether he would institute suit to reduce the determination of the Interstate Commerce Commission to judgment, as required by the Act of 1878, or suffer the injunction to issue, and, in this connection, the court said:

The purpose of the mint we found to challenge he can be compared to the mint we found to challenge his authority to withhold a sum of money admitted to be dear and payable. In such a case it is not necessary to join the United States. But as we State and the commission, as parties plantifi, have instituted a mit to make effective the order of the commission from the plantification of the minted states and the commission from the application through the plantifi, have instituted a mit to make effective the order of the commission from the application plantifies which is the contraction as we find it now, and that no injunction should issue pending the determination of the proceed-upon the compared to the condition as we find it now, and that no injunction should issue pending the determination of the procedure of the state of

In the circumstances the Court of Appeals affirmed the decision of the lower court denying the injunction with directions that if it should be found that the Comptroller General had withheld moneys otherwise due the railroad in excess of the claimed indebtedness to the United States, such excess should be ordered paid to plaintiff at once.

Before the suit by the United States against plaintiff was heard and decided by the District Court, the case was dismissed on motion of the plaintiff and the defendant, as herinbefore stated, without any consideration of or decision by the court as to whether under section 15a (6) of the Act of February 28, 1920, eypor, plaintiff was or was not indebted to the United States surior to June 16. 1933.

In these circumstances and for the reasons hereinbefore stated, the petition must be dismissed and it is so ordered.

Madden, Judge; Jones, Judge; and Whalet, Chief Justice, concur.

WHITAKER, Judge, took no part in the decision of this case.

#### THE REED PROPELLER CO., INC., v. THE UNITED STATES

[No. 42133. Decided January 5, 1942]

#### On the Proofs

Patents for displane propeller; validity; indisponent; descriptions indefinite and embiguous—Phere the alleged discovery or principle which the inventor attempts to teach the public by means of the specification in the application for patent #1,00,000 is dependency upon the contributing effect of contribution force to a degree or extra previously not contemplated by the alignatus prosphere designer; it is held that this algotude and the contribution of the by the alignatus prosphere designer; it is held that this algotude of the contribution of

of an internative of the property of the prope

Some.—Where in the claims to monopoly with relation to patent #1,463,556, the only distinction which the claims attempt to make with respect to the prior art is one of proportion, as

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indicated by use of the phrase "partly but mainly;" and where the pattent monopoly is not expressed in conteat exact terms in accordance with the statutes; it is held than the the claims theremely are ambignous and the patten accidingly does not fulfill the requirement of the patent statutes and is therefore void.

Same.—It is held that upon the specifications and data produced relative to the Government propeller charged as infringing patent #1.465,566, the claims 1, 2, 3, 4, and 13 in issue, even if they were not invalid, are not infringed by the Government structure.

Some.—It is held that claims 1, 5, 15, and 18, patent #1,518,140, Some.—It is held that claims specify the degree or extent to which centrifugat force is employed, fall to define a patent monopoly and said claims are not infringed by the Government structure and are leavild.

Same.—It is hold that claim 14, putent #1,518,140, directed to a metal acconsulted propeller with bindes increasing in cross-section from the tip toward the hub, is indefinite with respect to patent monopoly, and is invalid, and not infringed by the Government structure.

Government structure.

Some.—It is held that claims 11, 12, and 13, patent #1,518,140, being directed to the material or composition of a propeller blade, and relating to the use of duradumia therein, express no patentsble invention and are therefore invalid.

The Reporter's statement of the case:

Mr. Charles H. Walker for the plaintiff. Messrs. Stephen H. Phillies and Alexander C. Neaus, were on the briefs.

H. Prators and Alexander C. Neave were on the Driess. Mr. Clifton V. Edwards, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant. Mr. J. F. Mothershead was on the brief.

The court made special findings of fact as follows:

 This is a patent suit alleging infringement of two United States Letters Patents to Sylvanus A. Reed, as follows:

No. 1,463,556, filed May 26, 1920; issued July 31, 1923. No. 1,518,410, filed June 22, 1922; issued Dec. 9, 1924.

These patents will be hereinafter referred to as the first patent in suit, and the second patent in suit, respectively. The first patent in suit is directed to an aeronautical propeller having single-piece biades thinner than previously Customary and dependent upon the stiffening effect of centrifugal force to make the propeller practically operative.

The second patent in suit is directed to blades of the type designated in the first patent in suit and to the use of certain metals or allows for aeronautical propeller blades.

Copies of the two patents in suit, plaintiff's exhibits Nos. 1 and 3, respectively, and copies of the Patent Office File Wrappers and contents thereof, of the two applications which matured into the two patents in suit, defendant's exhibits Nos. 100 and 161, respectively, are by reference made a part

of this finding.

2. The plaintiff was incorporated under the laws of the State of New York on January 8, 1924, by Reed and others. The first patent in suit was issued to the inventor and was assigned by him to the plaintiff on January 15, 1924. The second nater in suit was issued directly to the polaintiff.

3. At the date of the filing of the petition in this suit, December 23, 1982, the plaintiff was, and had been for at least six years, the sole and exclusive owner of the entire right, title, and interest in and to the patents in suit and all rights of recovery thereunder.
4. Notice of infringement was given by plaintiff to de-

fendant in a letter dated January 23, 1931, addressed to the Secretary of War, receipt of which was acknowledged February 3, 1931, and in a letter dated May 21, 1931, addressed to the Secretary of the Navy, acknowledged July 2, 1931. 5. The two Read paterts in suit have been involved in

 The two Reed patents in suit have been involved in previous litigation but have never been adjudicated.
 Included in such previous litigation was an earlier suit.

on Reed patent No. 1,468,666 filed May 5, 1924, by plaintiff against the Standard Steel Propeller Company in the United States District Court for the Western District of Pennsylvania. This unit was dismissed under date of January 28, 1929, defendant having entered into a license agreement with the plaintiff under date of November 3, 1928.

On January 26, 1925, a suit on the same two patents here in twas filed in the Court of Claims by plaintiff against the United States, this suit being based on certain propellers which the Government had purchased from the Standard Steel Propeler Company. Reporter's Statement of the Case

This suit was dismissed on motion of plaintiff without

prejudice on January 19, 1929.

The testimony of the patentee, Sylvanus A. Reed, in the former suit in the Court of Claims, No. E-544, is in evidence in the present case as defendant's exhibit No. 178, and the testimony of defendant's witness, Frank W. Caldwell, and the testimony of defendant's witness, Frank W. Caldwell, and the testimory of defendant's witness, Frank W. Caldwell, and the testihist is referred to therein, were transferred to the present case by Order of this Court dated September 18, 1894. Those exhibits are made a nart hereoff to wrife-rance.

6. In addition to the liomas agreement above referred to, the Curtiss Aeroplane & Motor Company, Incorporated, is also licensed under the patent in suit. Its license was first acquired April 96, 1923, directly from Reed and later amended June 17, 1994, and April 1, 1999. The Curtiss Company acquired the capital stock of the plaintiff company by purchase from Reed and his associates for the sum of \$83.00.00.

#### OPERATION OF AN ARRONAUTUCAL PROPELLER

7. An aeronautical propeller is a device consisting of two more bidned stateds to or made integral with a high bidned being set at an angle so that when rotative effort, the configuration of the suppliery positioned bidned search a threat and pulls or drives the servolane through the six. The propeller is therefore in effect a transformer of torque into threat and the degree to which the rotational power is not efficiency of the propeller.

As the propeller rotates, its forward movement as a whole is along its rotational axis and the blade sections therefore travel in a helical path. The theoretical forward advance of the propeller for one complete revolution, is termed the "pitch."

The thrust efficiency of an inclined surface moving through the air is dependent both upon the inclination of the surface and its speed of movement. As the outer portions of a propeller blade have a greater radius and move faster than those portions near the hub, the usual propeller has its blades designed so that the pitch angles of the blades are greater at the hub than they are at the tip proprior. A propeller blade thus designed with varying pitch angles is a twistet blade and is termed a helical blade as distinguished from a flat blade which has an equal pitch angle from its hub to its tip.

The outer two-thirds of the blade is that portion usually depended upon to do the most work.

Efficiency is also dependent upon the shape of the cross section of the blade, the efficiency of the blade varying at different distances from the hub. Thin cross sections which are termed thin "air foils" are more efficient than thick ones, and this fact has been known since the earliest days of development of aircraft.

It is necessary to have a blade of compromise design in order to retain as many as possible of the advantages of the thin blade, and at the same time have the thickness essential to withstand the various stresses to which it is subjected.

8. The various forces acting upon aeronautical propeller blades may be classified as follows: 1. Bending and Tensile Stresses:

- (a) Air load (findings 9, 10).
- (b) Due to centrifugal force (findings 11, 12, 13).
- Torsion Stresses:
  - (a) Air load (finding 14).
     (b) Due to centrifugal force (findings 15, 16, 17).

9. A propeller in operation during take-off, climb, or level flight, has a forward or positive thrust, the rear surface of the blades pushing against the air. These air forces acting upon the rear of the blades tend to bend them forward out of the plane of rotation.

out of the plane of rotation.

The blades in resisting the bending moment produced by
the air forces act as cantilever beams fixed at the hub and
free at the tip. The amount of bending will be dependent
upon the elasticity of the material used as well as upon the
thinness or theilomese of the blades.

When the aeroplane is placed in a diving attitude, the air forces then act upon the front surfaces of the blades, causing the propeller to drive the engine in a similar manner to that of an engine of an automobile being driven by the wheels when the automobile goes down a hill. During

diving there is a negative thrust with a consequent tendency

of the air forces to bend the blades backward. There is no satisfactory estimate known to those skilled in the art of propeller design as to what the tip deflection of a blade would be in order to impair the serodynamic efficiency, but it is generally agreed that the aerodynamic efficiency of a propeller is not measurably impaired by the bending of the blade at the tip amounting to 4% of the

diameter of the propeller. 10. In addition to the tendency of the air forces to bend the blades out of the plane of rotation, there is also a tendency of the blade to bend in its plane of rotation. This may be expressed as a tendency of the blade tip to lag behind the position which it would otherwise assume in its rotational plane if the blade had no pitch and thus were

doing no work upon the air. 11. Each particle of a rotating propeller is urged radially outward from the axis of rotation by the action of centrifneed force. Each cross section is, therefore, subjected to a tensile load equal to the pull of centrifugal force on that portion of the blade lying between the tip and the section in question. Furthermore, since the direction of action of centrifugal force on each portion of the blade is radial, i. e., perpendicular to the axis of rotation, if the center of gravity of the portion of the blade between any cross section and the tip does not lie in the same radial line as the center of gravity of that cross section, then, in addition to the tensile load, centrifugal force will impose a bending moment

on the section. The direction of action of this bending moment is such as to urge the rotating blade toward a position in which the

axis of the blade, i. e., the line joining the centers of gravity

of the various cross sections, would lie in a straight radial line perpendicular to the axis of rotation. The plane generated by such a radial line as it rotates is referred to as the plane of rotation.

the plane of rotation.

Another way of stating the action of centrifugal force in producing bending moments in a propeller is that if the axis of a rotating blade is not already located in the plane of rotation, centrifugal force tends to move it there.

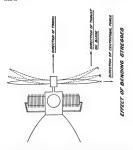
In metal propellers such as are herein involved, the pull due to centrifugal force on a blade near the hub is approximately twenty-five tons.

12. The effects of the air load and centrifugal force as described in fidings and 11 are graphically represented in exaggested form in the drawing reproduced in this finding. In this drawing, which shows a radial propeller of the tractor type driven by an internal-combustion engine, the position of the propeller based when at rest is indicated at 1. If the propeller is contemplated as revolving in normal operation but estimate the effect of centrifugal force (a consideration as the propeller is contemplated as revolving in correct and according to the propeller in the propeller is contemplated as a contemplate of the propeller contemplated in the propeller is contained to the propeller in the propeller is contained to the propeller in the propeller in the propeller is contained to the propeller in the propeller in the propeller is the propeller in the propeller in the propeller is the propeller in the propeller in the propeller in the propeller is the propeller in the propeller in the propeller is the propeller in the propeller in the propeller is the propeller in the propeller in the propeller is the propeller in the propeller in the propeller is the propeller in the propeller in the propeller is the propeller in the propeller in the propeller is the propeller in the propel

It is possible to calculate the air load as applied to the rear face of the propeller and to calculate the amount of tip deflection of the same under this theoretical condition, as well as the bending stresses imparted to the blade by such deflection. These bending stresses may be mathematically contemplated as a tensile stress in the rear portions of the blade and a compression stress in the rear portions of the blade.

With the propeller in actual flight operation, centrifugal force tends to restore the blades to a radial position and therefore to resist the fexure or bending due to the air load alone. The propeller will therefore assume position 3 intermediate the no-load position 1 and the flexed position 2 due to air load alone.

In position 3 the degree of flexure will be less, and hence the tensile stresses due to air load alone will be less. The Reporter's Statement of the Case
total tensile stress however will be the tensile stress due to
centrifugal force added to the tensile stress due to air load
with the degree of flexure indicated in intermediate position 3.



13. The centrifugal force is a fairly constant quantity per revolution at any given engine power and propeller speed.

The air load on the propeller blades is fluctuating in character. One cause of such fluctuation is due to interference between the blade and certain portions of the aeroplane behind the blade, such as a wing or landing gear Reporter's Statement of the Care
strut which causes changes in the air load as the blade
passes that portion of the aeroplane.

It is possible to calculate the approximate air load at arriance postitions along a propeller blade and then to mount the propeller in a horizontal position and apply the calculated load by means of weights at calculated points on the propeller blade. By means of such procedure termed a static test, it is possible to directly measure the tip deflection of a propeller blade due to the air load, and as indicated by nosition 2 in the drawing percoduced in finding 19.

oy bounced 2 in the drawing reproduces in thoming 12.

A second form of test known as the whill test involves the mounting of a propeller either on the shart of an internal under various speeds and power conditions, and observing or measuring the tip deflection by meass of an optical system. Such a test gives the resultant deflection as indicated in position 3 of the above-mentioned drawing and which is due to the combined entire of a relation of air load and centrifugal force.

the combined action of air Joad and centrifugal force.

M. As a propeller blade rotates, he air fend acting on the include surfaces of the blade fends in general to increase the pitch angle of the blade, or expressed in another way, the blade tends to blie deeper into the air. Such action is shown in the following alsoth, "Effect of Torsion Stresses," in which the normal position of a propeller blade is shown to the solid position of a propeller blade is shown to the solid position of a propeller blade is shown to see section at 1, its direction of rotation being indicated the section of the solid position of the section of the

Such tendency or the degree of torsional stress thus set up at any given cross section is dependent upon a number of factors, such as the pitch angle of the blade, its thickness, its taper, its center of pressure, and its ratio of width to thickness at various sections, and its lineal speed relative to the air at this section.

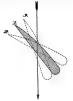
to the air at that section.

15. Centrifugal force tends to bring all of the particles of
the blade into the same plane and thus tends to decrease
the pitch angle of the blade. As shown in the sketch, the
tendency of centrifugal force is to twist the blade into the
position shown in the dotted line section 3.

000

Reporter's Statement of the Case 16. The combined effect of air load and centrifugal force

on the torsional stresses set up in the blade is the algebraic sum of these at any given point or cross section. The torsional stresses due to centrifugal force near the hub of the propeller are ten or twelve times that of the torsion due to air load, and the resultant tendency is to reduce the pitch.



# EFFECT OF TORSION STRESSES

Near the tip or outer portions of the blade, however, where the sections of the blade are relatively thin and light, the torsion due to air load is greater than the opposite torsional effect due to centrifugal force.

There is in general therefore, and under the action of these combined stresses, a tendency for the blade to increase its pitch near the tip and to decrease its pitch in the central part and for certain sections near the hub.

17. If the tips of the propeller are very thin, the tendency of the blade at the tip portion to increase in pitch angle actually causes a deflection of the same. This increases the angle of attack and in turn increases the thrust or air load on the tip, which in turn causes a still greater deflection. This deflection, not being exactly parallel to the axis of rotation of the propeller, causes a rise of centrifugal torsion at that point with a consequent decrease of pitch aided by the elasticity of the blade.

There is thus existent a periodical function of an incress of thrust followed by an incress of centifugal torsion with a consequent cycle of increase and decrease of pitch angle. This phenomenon, which is called "flutter," causes a rapid periodical alternate stressing of the blade in torsion in opposite directions, which causes faitgue in the fibers of the material of which the propeller is made, ultimately resulting in a fracture of the propeller.

Due to the existence of this fluctuating tendency it is of prime importance in propeller design that a blade be of sufficient rigidity to obviate excessive "flutter."

18. The torsional stresses in a propeller blade are highly complicated and involve so many variables that it is an impossibility to make satisfactory calculations of the stresses due to torsion.

Due to the fact that a propeller is driven by an internalcombustion engine, certain vibratory stresses are imparted to the blades by the power impulses of the individual pistons.

The design of an aeronautical propeller which involves any departure from standardized forms of construction involves a whirl test and a flight test, and a design of the blade by empirical methods so as to obtain a blade as thin and light as possible and yet not sufficiently weak because of its thinness to cause dangerous fluctuating torsional and vibratory stresses.

19. The torsional stresses are at right angles to the tensile stresses imposed by the bending effects of centrifugal force and air load, and are therefore not directly additive quantities.

20. Since the early days of the aeronautical propeller art, it has been a fundamental concept that a propeller should be as light in weight and have blades as thin as possible

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concomitant with the ability to have ample strength and to
resist wear and fracture; and both wooden and metal pro-

resist wear and fracture; and both wooden and metal propellers had been used prior to the origin of the disclosures embodied in the patents in suit.

In 1920 the conventional tip speed for propellers was from

800 to 900 feet per second, it having been found that a propeller is not as efficient if the tip speed approximates or is greater than the velocity of sound, which is 1,100 feet per second.

Propellers from 8 to 9 feet in diameter would require rotative speeds of approximately 1,900 to 2,100 revolutions per minute to give them a tip speed of 900 feet per second.

### THE PATENTS IN SUIT

21. The thought or principle expressed in the first patent in sait (patest No. 1468,556) is that prior are propellers were designed with blades thick and heavy enough to give most principle. The prior principle is taken sufficiently into consideration, some of the material previously thought necessary to obtain sufficient structural rigidity may be afely omitted, the resulting thinner blades more than the rice at thick blades of operation at higher more than the rice at thick blades.

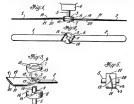
The stiflening effect of centrifugal force is referred to in the specification by the patence as "dynamic rigidity" or "quasi rigidity" or "wirtual rigidity," the word "rigidity" as used having its conventional dictionary meaning of "the multiv of resisting chance of form."

The terms "structural rigidity" and "intrinsic rigidity," as used in the patent specification, are synonymous and mean the resistance to deformation of the propeller blades by virtue of the physical properties of the material from which they are constructed, it amount and dispention. Such structural rigidity is of the same value whether the blades are rotating or at rest.

22. Figures 1 and 2 of the first patent in suit disclose an aeroplane propeller made of a single piece of material

Reporter's Statement of the Case
twisted to give the desired pitch to the blades, the blades
diminishing in thickness from the hub out to the tips.

Figures 1, 2, 3, and 5 are reproduced herewith, figure 3 showing the details of the hub mounting, and figure 5 showing a modified form in which separate blades are set or anchored into the hub, the blade being shown in cross section.



FIGURES 1, 2, 3, and 5 of Patent No. 1,463,556.

The patentee states in his specification that:

My invention relates to propellers for air craft and flying machines and discloses a novel principle for obtaining the necessary rigidity of the propeller blades to resist the stresses, thereby making possible the use of much thinner blades than heretofore with a gain in efficiency.

Herefofore aeronautical propellers have been made of material such as wood or metal constructed to be structurally rigid against operative stresses, such rigidity usually being substantially sufficient, veen when at rest, to resist tangential axial and radial stresses which would occur in full speed operation. It is obvious that when

Reporter's Statement of the Case an aeronautical propeller, say eight feet diameter, is operated at say 1200 revolutions per minute, centrifugal force adds to the structural rigidity due to the form of the propeller, a quasi or virtual or dynamic rigidity from the radial tension due to centrifugal force, and this added rigidity is a contingent advantage, but hitherto not regarded as an element which would justify omitting any considerable percentage of the elements providing static or intrinsic rigidity. This has much justification where the rotative speeds do not much exceed 1000 revolutions per minute. If, however, high rotative speeds are used, such for example, as say 5,000 to 15,000 revolutions per minute, the centrifugal force becomes such a large factor that a progressively less necessity exists for structural or intrinsic rigidity and I have ascertained by many experiments, and as can be easily calculated from well known laws of mechanics, that at certain rotative speeds, a stage or condition is reached where structural or intrinsic rigidity can be largely and to a substantial extent discarded in the design of the propeller and its construction, and reliance placed mainly upon the quasi or virtual rigidity of kinetic character due to centrifugal force.

The patentee further indicates that his invention may be practiced with a propeller having its blades made of either metal, an alloy of metal, wood, or a suitable composition, and that the material used may be flexible, pliable, ductile or malleable.

## The patentee states that:

I make my improved blade relatively thin and thinner than customary throughout, thereby dispensing with a large amount of material which has been required heretofore to give the blade the proper amount of rigidity, and which thin blade when operated at that high speeds herein referred to receive a degree of rigidity imparted thereto by radial tension sufficient to make it trueficially contraitive.

By dispensing with the bulk necessary for intrinsic rigidity, my improved propeller wastes less power in friction and air resistance than propellers of the intrinsically rigid type, and it is therefore more efficient.

One important requisite set forth in the specification is that when the blade is of the required thinness, it will fulfill Reporter's Statement of the Case the essential requirements herein stated. The patentee defines the term "relatively thin" in the following phraseology:

The term relatively thin as used herein is intended to define a body whose maximum thickness is that of a metal plate as distinguished from the thinness of a metal sheet, on the one hand, and the thickness of a metal bar or like bulky body, on the other.

It is to be noted that the flexing stresses of operation

It is to be noted that the flexing stresses of operation are slight at slow rotative speeds, as while getting up speed, the centrifugal force being also slight, but the degree of flexibility of my blades at various points is so proportioned that at every speed the centrifugal force supplements the intrinsic rigidity sufficiently for the necessary actual rigidity to meet the stresses at that speed.

23. The claims of the first patent in suit are as follows:

1. An aeronautical propeller having single piece

blades constructed of material of such thinness as to require dependence partly but mainly upon the radial tension exerted by centrifugal force to maintain the blades in operative form or shape.

2. An aeronautical propeller having single piece

blades of material which is flexible and dependent partly but mainly upon centrifugal force to give the blades sufficient rigidity to substantially overcome lateral deflecting forces tending to reduce efficiency. 8. An aeronautical propeller having single piece blades

8. An aeronautical propeller having single piece blades dependent for resistance to flexure caused by air partly but mainly upon the virtual rigidity imparted by radial tension due to centrifugal force.
4. An aeronautical propeller having one-piece blades

4. An aeronautical propeler naving one-piece bindes dependent for resistance to fexure caused by air partly and substantially upon the virtual rigidity imparted by radial tension due to centrifugal force, and means combined therewith for rotating the propeller at a rate adequate to cause centrifugal force of the degree necessary for sufficient virtual rigidity.

18. A metal aeronautical propeller whose blades are relatively thin and taper in thickness from root to tip and which depend for resistance to axial and tangential flexure by air during rotation mainly upon virtual rigidity imparted thereto by centrifugal force.

24. The material portions of the claims in suit, as set forth in finding 23, have been indicated by italicization. Reporter's Statement of the Case

The patent specification contains no specific figures or data relative to just how thin or how thick a given blade should be in order to depend partly but mainly upon centrifugal force resistance to flexure. The patent sets forth neither a maximum nor a minimum limit, nor any critical thinness between maximum or minimum. Specific values would vary in different propellers in accordance with such factors as engine power, speed, and air load.

The specification contains no data or instructions on how to construct the blades to resist torsional stresses and vet make them thin enough to depend partly but mainly upon centrifugal force for resistance to flexure.

The mathematical equations and methods necessary to determine the bending load or stresses due to air load alone, and the bending and tensile stresses due to centrifugal force were known to those skilled in the art at the time the Reed application, which materialized into the first patent in suit, was filed.

Structural rigidity (i. e., the ability to resist flexure by virtue of the physical characteristics of the propeller) and dynamic rigidity (i. e., the stiffening effect of centrifugal force) are terms susceptible of computation.

25. The second Reed patent in suit (No. 1,518,410) issued upon an application filed June 22, 1922, is in general similar to the first patent in suit in that it contemplates and describes the use of thinner blade sections through reliance upon the stiffening effect of centrifugal force or "dynamic rigidity."

It supplements the description of the first patent in two main respects as follows:

(a) It discloses the thought of tapering the blades in width as well as in thickness from the hub to the tip.

(b) It discloses metal blades made of specific material such as alloys of aluminum or duralumin.

The specification recognizes the detrimental effect of centrifugal force on torsional rigidity, stating on page 1 as follows:

The effect of centrifugal force, while favorable to resistance of the blade to forward and tangential flexure under the influence of air resistance, may be unfavorable to permanence of the longitudinal twist given to 95 C. Cls.

the blades to give them the desired helical pitch, and o maintain this twist constant, the intrinsic rigidity of the blade must be sufficient to resist the influence of air resistance. While the centrifugal force is sufficient to genital flexure to the thin sharp outer portions of the lades, yet the rigidity of the blades, against change of pitch is maintained, there is needed a correct adjusttant the successive blade room sections entitions and form at the successive blade room sections entitions and form

The specification also contains a description of specific propeller construction on page 4, the inventor stating: I have found that for an absorption of 400 H. P.

with a 10-foot propeller at 2,000 R. P. M., and a pitch of 6 feet, a thickness at the bends or twisted portions of about % of an inch, with a width of 10 inches will suffice, when one uses material such as duralumin, or similar aluminum allov, of extra tensile strength and elastic limit. As the blades taper in thickness steadily to 1/4 inch or 1/4 inch, or less, at the tips 5 and 6, and also taper materially in width outwardly toward the tips, the resulting lightening in weight toward the tips compensates for the increased radius, so that the blades may be calculated for a substantially uniform radial tension per unit of cross section and the aggregate of such radial tensions at the bends or twists near the axis region may be regulated not to exceed the amount which the bends or twists can sustain without straightening out under the duty for which the propeller is planned. Figure 8 of this patent shows a propeller blade in which the tip portions are bent forwardly of a plane perpendicular

to the axis of rotation. Such a construction is known in the art as a compensated propeller. (See finding 46.)

The patent states with reference to this construction that:

In Figs. 8, 9, 10, 11, I show a variation in the construction of the propeller in which a virtual twist in the central part 7—8, for bringing the sections at those points to the required angle with the plane of rotation, is accomplished by a compound bend at 18—19, and 20—21, these bends being in opposite directions and at angles 18 with 10, and 20 with 21, and each extention with the variety of the property of the property of the varanterical with the vair 20—20, pair 18—15, being exametrical with the vair 20 with 20 with the vair 20 with 20 with the vair 20 wit 20 with the vair 20 with the vair 20 with the vair 20 with the Figures 1 and 2 of the patent reproduced herewith are illustrative of a form of blade tapering both in width and thickness.



FIGURES 1 and 2 of Patent No. 1.518.410.

Figure 8 is reproduced herewith:



Fromm 8 of Beed Patent No. 1,518,410.

26. The claims in suit of this patent are of two types. Claims 11, 12, and 13 are directed to a propeller blade formed of a given material, and claims 1, 5, 14, 15, and 16 are, in general, directed to propellers made from lightweight metal alloys tapering in thickness and requiring the supplemental stiffening action of centrifugal force for effec2 Reporter's Statement of the Case

tive operation. These two groups of claims in suit are as follows:

 An aeronautical propeller having blades formed of an alloy of aluminum.
 An aeronautical propeller having blades formed

of duralumin.

13. An aeronautical propeller having blades formed of forged alloy of aluminum.

 An aeronautical propeller having blades formed of light-weight metal having a high degree of tensile strength and converging in cross-section toward the outer portions of the blades and depending partly but mainly upon centrifusal force for effective operation.

5. An aeronautical propeller having blades formed of duralumin or an alloy having substantially the physical characteristics thereof and said blades being of such thinness that the structural rigidity due to material and shape is not sufficient to produce the total rigidity which is necessary to overcome the resistances in operation but has to be supplemented for an essential part by the kinetic

rigidity resulting from the centrifugal force.

14. An aeronautical propeller provided with blades formed of light-weight metal having a relatively high tensile strength, said blades having relatively thin outer portions and increasing in cross-section away from the outer portion and graded in width and cross-section.

only to the extent necessary to maintain the pitch twist of the blades.

15. An aeronautical propeller having metal blades converging in width and thickness toward the outer

converging in width and thickness toward the outer ends, said blades possessing a substantial degree of rigidity but the degree of convergence being such as to require the supplemental stiffening action of cen-

trifugal force for operation.

16. An aeronautical propeller having blades formed of light-weight metal having a high degree of tensile strength, said blades converging in cross-section toward the outer portions thereof and demending upon contrif.

the outer portions thereof and depending upon contriugal force for effective operation. [Italics ours.] 27. The term duralumin was originally applied to an alloy of alumnium developed by a Dr. Wilm in Germany. As

of alumnium developed by a Dr. Wilm in Germany. As first described in 1909 and 1910, it comprised an alloy of aluminum, copper, and magnesium, and about 1914 it comprised an alloy of aluminum, magnesium, copper, and manganess. The usage of the term duralumin has now become more generic, and is now used by those skilled in aeronautical art as meaning, in general, a lightweight aluminum alloy.

With respect to the claims in suit of the second patent, which are directed to the utilization of centrifugal force (claims 1, 5, 15, and 16), they depend generally upon the same scope of disclosure of structural and dynamic rigidity as the first patent in suit and as set forth in finding 24, with the exception that in the second patent the importance of constructing a propeller with a sufficient degree of torsional rigidity is emphasized.

28. There is no satisfactory evidence of conception or reduction to practice of the inventions set forth in the claims in suit of the first patent, claims 1, 2, 3, 4, and 13, earlier than May 26, 1920, the filing date of the Reed application which materialized into this patent.
While Reed began his investigations on propellers in or

about November 1916, and conducted a series of tests terminating in the construction of a full-sized propeller was tested in actual flight on August 30, 1921, there is no corroborative evidence as to what these tests were or to what extent the various model propellers were dependent upon centrifugal force.

Some time between May 27, 1921, and August 30, 1921,
 Reed constructed a propeller known as the D-1 Propeller,
 which propeller is in evidence as defendant's (physical) exhibit 109.

This propeller which was constructed of forged and rolled duralomin (this term here is used in the generic sense) was flight tested on an aeroplane on August 30, 1921, and subsequently sent to the Engineering Division of the United States Army Air Corps at McCook Field, Dayton, Ohio, for tests, the results of these tests being given in a report of the War Department, defendant's exhibit 110, which is by reference made a part of this finding.

30. The D-1 Propeller consists of a single slab of duralumin. The central portion is appropriately shaped and perforated for installation in a conventional wood propeller hub, using spacer blocks to fill in the spaces between the

front and rear surfaces of the duralumin slab and the much more widely spaced flanges of the hub for a wooden propeller. The working portions of the blades, which are integral with the hub portion, are tapered in both width and thickness toward the tip. The blades are thin.

The flight test of this propeller establishes a date of conception and reduction to practice as of August 30, 1921, for claims 11, 12, and 13 of the second patent in suit.

No calculations or data have been presented relative to the digree of the centributing effect of centrifugal force against flexure or to determine how much the blades defected under air load but without centrifugal force, or whether or not the blades required or depended upon contrifugal force to enduce the atreass therein to a safe limit. The contract of the blades required to the blades of the section of the blades at various stations was just sofficient to maintain the nich of the blades.

31. There is no satisfactory evidence of a date of conception or reduction to practice of the inventions set forth in claims 1, 5, 14, 15, and 16 in suit of the second Reed patent, earlier than June 23, 1922, the filing date of the application which materialized into this patent.

#### THE ALLEGED INFRINGING STRUCTURE

32. The defendant's structure charged as an infringement in this case comprises an exceptane propeller having two forged blades, each blade being of the helical type and adjustably held in common hub. Each blade changes in eross section from approximately circular at the hub portion to flat at the outer tip. The blades are on a straight radial axis and taper in thickness from root to tip, also tapering in width for the outer portion of the blade.

The dimensions of the propeller are shown by the stipulated drawings and specifications, plaintiff's exhibits 24 and 25, which are by reference made a part of this finding. This propeller is also exemplified by defendant's physical exhibit 48. The diameter of the propeller is 9 feet.

33. The blades are made from aluminum alloy forgings having a chemical composition in accordance with the U. S. Army Specification, plaintiff's exhibit 25, which is by reference made a part of this finding. This specification gives a composition of aluminum alloy (Grade 2) for "large forgings, such as propellers, crankcases, and similar parts," which is as follows:

Aluminum	92%.
Manganese	0.4 to 1.2%.
Silicon	0.5 to 1.20%
Magnesium	0.01% max.
Compar	9.0 to 5.0%

The ultimate strength of the material is a minimum of 55,000 pounds per square inch; minimum yield strength of 80,000 pounds per square inch; a minimum elongation of

16% in 2 inches; and a Brinell hardness (10 mm. 0.500 kg.) at surface. This propeller is designed to rotate in normal operation

In level flight at an altitude of 6,000 feet at 2,200 r. p. m. with an engine output of 525 horsepower.

34. Plaintiff has calculated the various stresses and tip deflections to which the defendant's propeller blade 30-735

is subjected in normal operation, these calculations being given in detail in plaintiff's exhibit 26, which is by reference made a part of this finding. For the material used in defendant's propeller the allow-

For the material used in defendant's propeller the allowable safe limit for stress is about 12,000 pounds per square inch.

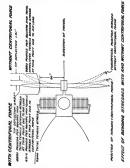
The calculations which deal with tip deflections indicate

The calculations which deal with tip deflections indicate that if defendant's propeller be theoretically contemplated as operating under the stipulated conditions of power and air load but without any effect of centrifugal force the tip deflection would be 1.41 inches, and the calculated tip deflection with centrifugal force present under the stipulated operating conditions would be 0.455 inches.

The theoretical tip deflection of 1.41 inches without the effect of centrifugal force is less than 4% of the diameter of the propeller (106 inches) and the aerodynamic efficiency of the propeller would not be measurably impaired by such deflection. (See finding 2, last paragraphs)

35. The calculations referred to in the previous finding indicate that the maximum bending stress occurs at 30 inches from the axis, or at the 30-inch station. The calculations are strongly as the station of the calculation of the station of the calculation of the station of

Reparter's Statement of the Case
lations show that under normal stipulated flight conditions
and without the effect of centrifugal force, the bending stresses
at the 30-inch station, due to air load alone, are 9,890 pounds
per sourse inch.



With centrifugal force acting, dynamic rigidity is created and the propeller is not bent or deflected to the position it would assume with air load alone.

At the 30-inch station and with centrifugal force acting, the tensile bending stress is 2,830 pounds per square inch 44973—42—CC—vol. 93——29 due to air load to which is added a direct tensile stress due to centrifugal force of 6,510 pounds per square inch, making a total tensile stress of 9,340 pounds per square inch.

inch.

In order that the tip deflections and bending stresses
may be visualized, there is reproduced herewith a diagram
with the stresses, tip deflections, and explanatory legends
shown thereon.

In the Government propeller the bending stresses have been reduced from 9,880 pounds to 9,340 pounds by the effect of centrifugal force, or 540 pounds per square inch, which represents a reduction of tensile bending stress of 446,222, or a reduction of 54,46%.

These calculations do not include torsion effects and other

varving stresses.

Reference to this illustration in which 0,800 pounds tensile bending stress is present in position 2 (theoretical position due to air load without centrifugal force) shows the impossibility of adding to this value any stress due to centrifugal force, for as soon as the latter is assumed to be present, the propeller will assume position 3, with a tensile stress due to air load of 2,800 nounds.

36. All the claims in suit of the first Reed patent (1 to 4, inclusive, and 13, finding 23) specify as a part of the inventive concept that the propeller should be either mainly or substantially dependent upon centrifugal force for rigidity or resistance to flexure.

The Government propeller, as indicated by the above calculations, is not dependent upon centrifugal force for resistance to flexure or reduction of stresses below the safe limit of 12,000 pounds, and the terminology of these claims does not another.

The Government propeller moreover is not a one-piece

blade within the meaning and intent of the patent.
37. Claims 1, 5, 15, and 16 in suit of the second Reed patent (finding 26) also relate to and include dependency upon centrifugal force and the terminology of these claims is not amplicable to the Government propelly.

38. Claim 14 in suit of the second Reed patent (finding 26) relates to a lightweight metal aeronautical propeller

Reporter's Statement of the Case with blades increasing in cross section from the tip toward the hub and containing the limiting phrase "graded in width and cross section only to the extent necessary to maintain the pitch tinist of the blades."

The patent specification is silent as to the power input and speed to which this limitation is applicable and the claim is indefinite.

There is no evidence that the Government propeller No. 20-735 is so constructed with reference to cross section only to the extent necessary to maintain the pitch twist of the blades under the stipulated conditions of engine output of 525 horsepower at 2,200 r. p. m.

A whirl test record of the Government propeller No. 30-735, plaintiff's exhibit 33, which is by reference made a part of this finding, on the contrary indicates that this propeller was successfully tested in a whirl test up to a speed of 2,400 r. p. m, with an input of 1,152 horsepower, the thrust curve continuing smoothly up to 2,400, indicating that there was no loss to thrust due to tip effect at 2,200.

The Government propeller therefore has not only width and cross section enough to maintain the pitch twist of the blades under normal operating conditions but will maintain this pitch twist under an ample margin of overload.

The phraseology of this claim cannot be applied to the Government structure.

39. Using the word "duralumin" in a generic sense, the Government propeller No. 30-735 is constructed of this material.

The phraseology of claims 11, 12, and 13, which relate, respectively, to an aeronautical propeller constructed of an alloy of aluminum, blades formed of duralumin, and blades formed of forged alloy of aluminum, is applicable to the Government propeller No. 30-735.

# PRIOR ART AND KNOWLEDGE

40. The following patents and publications were available to those skilled in the art on the respective dates indicated;

Publication entitled "Aviation and Aeronautical Engineering" published December 1, 1917 (plaintiff's exhibit 30).

Report of the Advisory Committee for Aeronautics, No. 420, published in March 1918 (defendant's exhibit 50). Periodical "Flight" published May 10, 1913 (defend-

ant's exhibit 172). U. S. Patent to Fauber, No. 971,030, patented Septem-

U. S. Patent to Fauber, No. 971,030, patented September 27, 1910 (defendant's exhibit 163).
French Patent to Penaud and Gauchot, No. 111,874.

patented February 18, 1876 (defendant's exhibit 182).
German publication "Technische Berichte," published
March 20, 1918, and available to the public in this country
on March 18, 1920 (defendant's exhibits 51 and 51A).
Catalogue on "Paragon Propellers" published about

May 1919 (defendant's exhibit 75).

"Screw Propellers for Aircraft" by Henry C. Watts, published January 15, 1920, and available to the public in March 1920 (defendant's exhibits 95, 96, and 97). "Manuel de I'Aristeur—Constructeur," by M. Calderara and P. Barnet-Rivet, published 1910 (defendant's exhibits 171 and 171A).

U. S. Patent to von Parseval, No. 954,992, patented April 12, 1910 (defendant's exhibit 173).

April 12, 1910 (defendant's exhibit 178).

"Luftschrauben" by Bejeubir, published 1912 (defend-

ant's exhibits 168 and 168A). Periodical "Flight," published January 1909 (defend-

ant's exhibit 164).

Periodical "Der Motorwagen" published September 10 1969 (defendant's exhibits 165 and 165A).

French Patent to Esnault-Pelterie, No. 403,951, patented October 7, 1909 (defendant's exhibits 166 and

166A). "Vehicles of the Air" by Lougheed, published 1909 (defendant's exhibit 167).

fendant's exhibit 167).

Periodical "Aerial Age Weekly," published December
2 1918 (defendant's exhibit 170)

2, 1918 (defendant's exhibit 170).

"Reports and Memoranda" No. 130, published June
1913 (defendant's exhibit 174).

French Patent to Drzewiecki, No. 519,759, patented January 31, 1921 (defendant's exhibits 169 and 169A). "Theorie Generale de l'Helice," by S. Drzewiecki, published and placed on sale in France on December 20, 1919

(defendant's exhibits 198 and 198A).

The above enumerated exhibits are by reference made a part of this finding.

41. French patent to Penaud and Gauchot, No. 111,574 (defendant's exhibit 162), issued February 18, 1876, discloses an aeronlane having an aeronautical propeller of metal. A Reporter's Statement of the Case

translation of the specification states with respect to the propeller as follows:

The serves are entirely metal and prefembly of steel. They are composed of a bind of spokes and of bindes of the present of the steel o

42. The problems of the extent of the first of the first

43. United States Patent to Fauber, No. 971,030, issued September 27, 1910 (defendant's exhibit 163), discloses what is known as an off-set or compensated propeller.

As shown in the drawings reproduced herewith, the propeller is constructed with separate blacks, each black having a cylindrical shank which is fitted into and secured to a contral hub. The specification testes that each blade and its shank will preferably be made of a single piece of nickles seed or other material of high tensis terrught and rigidity, or forward and rear edges adapted to lesson the resistance of the sir.



Figurate 10 and 11 of patent to Fauber, No. 971,080.

As shown in the drawings (figs. 10 and 11), the propeller is designed with the blades tilted or inclined forwardly of a plane perpendicular to the axis of rotation. Reserver's Statement of the Case

The specification states with respect to this form of construction that:

. . The thrust of the outer parts of the blades on the air will manifestly tend to bend or deflect said blades forwardly or reversely to the direction of the thrust, but if the blades be inclined forwardly, as shown, the centrifugal force generated by the high speed of the propeller will tend to straighten the blades or throw them to a position perpendicular to the central axis of the shaft and to thereby counteract the effect of the thrust and to a large degree relieve the shanks of the blades of the leverage due to such thrust. The inclined arrangement of the said blades thereby largely avoids the liability of fracture of the blades under the combined action of centrifugal force, bending and vibration, it being manifest that the centrifugal action which tends to throw the outer ends of the blades rearwardly will counteract the thrust of the blades which tends to bend them forward, to such extent as to practically relieve the shanks of the blades from strains tending to break them. . .

The specification also indicates that by reason of the counteracting effect of centrifugal force, the blades may be made light and thin.

make light and tim. Inspection of the project of "Flight" publish. The propeller disclosed in the project of "Flight" published. The propeller, and the "Garded" propeller. In this propeller, which is of the community of the propeller, which is of the community of the propeller, which is of the community of the propeller. In this propeller, which is of the community of the propeller of the "Fazor of the "Fazor of carbon for the propeller of fazor of the "Fazor of the "Fazor

The purpose of the use of centrifugal force in this "Garuda" propeller was to relieve the bending stress due to thrust, particularly at the roots of the blades.

45. Reports and memoranda No. 420 of the Advisory Committee for Aeronautics, published in March 1918 (deReparter's Statement of the Case

Rendant's exhibit 50), discloses in Figure 3 a wooden propeller having blades tapered in width and thickness and of the compensated type. This article contains a detailed discussion of formulae and methods of computing stresses, due to centrifugal force and air load.

The design computations relating to the propeller shown in Figure 3 appear in Tables 4 and 5 in this article. These tables include separate values of stresses due to the air and stresses due to centrifugal force.

The article does not state the kind of wood of which the propeller under discussion is made, nor does it give the ultimate fracture stresses.

This publication discloses to those skilled in the art that

the structural rigidity of an aeronautic propeller may be supplemented by the effect of centrifugal force to reduce the bending stresses due to air load; and the article gives to those skilled in the art the necessary mathematical formulae by means of which the degree of dependency upon centrifugal force may be calculated in a propeller design.

48. The effect of stresses in propeller as of the compensated

46. The effect of stresses in propellers of the compensated type, described in findings 43 to 45, may be visualized by reference to the exaggerated diagram reproduced in finding 12.

ing 12. The compensated type of propeller is constructed with the tip bent forward, such as are indicated in this illustration by position 3. The stress due to air load when the propeller is in operation tends to bend the propeller blades into the position indicated at 2, while the effect of centrifugal force tends to place the propeller in a plane perpen-

dicular to its axis of rotation as indicated by position 1.

A compensated type of propeller may be designed so that
for a given rotational speed and a given air load, the effect
of centringal force will entirely relieve the bending effect
of air load and at the given speed and load there will be
no tendency whatever for the propeller to bend or fits forwardly. If the air load is increased as in a climb and the

wardly. If the air load is increased as in a climb and the speed is not increased the thrust force will then tend to deflect the blade forward, the centrifugal force partly relieving the thrust load. Reporter's Statement of the Case

If the air load is relieved as by diving the aeroplane, the centrifugal force will predominate and will tend to bend the blade toward the vertical plane through the axis of rotation.

44. The prior publication "Manuel de l'Ariateur-Contructeur," publicé in 1910 (dérédant) exhibite 171 and 171A), teaches that when an inclination in given to the blade and 171A) teaches that when an inclination in given to the blade in of an aeronautical propeller, each section of each blade in force; that the threat force tends to deflect the blade for force; that the threat force tends to deflect the blade is resultant of these two force; that the is accomplished by enultant of these two force; that this is accomplished by such as the section of the section of the blade is that when the propellers are make of metal and are semewhale heavy, it is advisable to online the blades slightly on account of the effect of centrifugal force, but if the blades of the propellers are sefulled and static the precaution of in-

This article also sets forth a mathematical formula for computing the effect of centrifugal force.

48. The publication "Technische Berichte" (defendante axhibits 51 and 51A) published in Germany, March 20, 1918, and available in this country March 18, 1920, contains an article entitled "The Bending Stresses of Propeller Blades and the Relieving Action of Centrifugal Force."

The introductory paragraphs contain the statement that up to the time of the writing of the article the problem of relieving the bending stresses by centrifugal force had been obtained by tilting the blade forward (compensated propel-lers) but that such relief must also occur with the blade axis right angles of the axis of the defection (radial propel-lers). The article discloses that as soon as a propeller blade is deflected, entiritingal force will act to relieve the bending

moments of the blade.

The publication also discloses a series of mathematical calculations and formulae, and states that the approximate blade tip deflection having been determined, the comparative importance of the relieving moments of centrifugal force

Reperfer's Statement of the Case can be seen from a mathematical equation set forth by the author.

The publication concludes with two examples of the formulae and equations in which the deflection of the blade tips is reduced by the centrifugal force a total of about 25 or 30 percent.

The term used in this article "relieving moment of centrifugal force" is synonymous with the terms used in the patents in suit such as "dynamic rigidity" or "virtual rigidity."

49. The prior publication "Screw Propellers for Air-erft," by Watts, published Jamary 15, 120, and available to the public in March 1200 (defendant's archibits 96, 96, and 97), teaches that if the centers of area of the blude sections of an accountainal propeller all lis on a straight radial station, the defection of the lime due to the defection of the blude under the influence of the bending moment due to the air lond, will again allow the centrifugal force to set up a bending moment. This latter bending moment will be acting in the opposite direction to the bending moment will be acting in the opposite direction to the bending moment will be acting in the opposite direction to the bending moment of the property of the publes excited to the bending moment of the property of the blude section to the bending moment of the property of the blude section to the bending momenter of gravity of the blude section.

This publication discloses that the action of centrifugal force on the blades of aeronautical propellers which were built on a straight radial line was known prior to May 28, 1920, and that centrifugal force in such propellers tended to neutralize the effect of the air load on the blades of such propellers.

This publication contains extensive mathematical formulae for computing stresses and specific examples of computed propeller design, together with calculated stresses set out in tabular form.

50. United States patent to von Parseval, No. 954,992 (defendant's exhibit 173), issued April 12, 1910, discloses a propeller in which the blades are made of fabric and are entirely devoid of structural rigidity. Pliant weight material, such as ropes or chains, together with transverse rods, is built into the blades, the ropes or chains being inserted in the leading edge of the blades.

When the propeller is in rotation the action of centrifugal force upon the weight material incorporated into the blades pulls the blades into operative shape.

These propellers are entirely dependent upon dynamic rigidity resulting from the action of centrifugal force.

51. The publication "Reports and Memoranda, No. 130" (defendant's exhibit 174), published June 1913, is a report of trials of a naval airship or dirigible. The following description of the propellers is incorporated in this report:

Propelers.—These are four-biated, reversible, of the Prasaval patent type. The blades are of thin sheet steel shrouded on the leading edge only. The pitch is out to the propeller boses. The principle of this type of propeller is as follows: The lower or boss end of the blade is set at the desired pitch, the fixibility of the thin steel sheet allowing the blade to take up a position triugal force) acting on it, the blade thus being in tension only. At east of these propellers on the ground gave a threat of just over 6 lbs. per h.

52. The German publication "Luftschnuben" (defendant's exhibits 168 and 188A) published in 1912, is an article entitled "Book of Instruction for the Construction and Treatment of Propellers." This publication discloses stresses upon the blades of aeronautical propellers with reference both to centrifugal force and the deflecting moment of the thrust. The article states.

• • • For this reason, semi-stiff propellers have been built recently, whose arms are not so Jimp as to collapse entirely, when standing still, although their stiffness is yet so small that a considerable centrifugal force is needed to produce the necessary thrust.

The article further suggests to those skilled in the art that aluminum may be employed for the blades of an aeronautical propeller, this being utilized by means of forming dies of cement; and the appendix to the article sets forth a table of strength values for propeller materials, the table giving the tensile and the elastic elongation.

Included in the table are the following materials:

Aluminum pure

cast forced sheet, 2mm, hard Aluminum alloys with 4% copper sheet 8 mm by B&S cast rolled tubing Aluminum-Bronze forced (according to A1-content) Magnalium annealed electron cast compressed Duralumin sheet. 7mm 4mm 2mm

2mm Forgings and pressings.

53. The publication "Flight," published January 1909 (defendants challs 194), contains an article on seroplane propellers. This article contains a table of propellers from the same propellers. This article contains a table of propeller with a brief description. It discloses six propellers having aluminum bilate mounted on steet tubes and including a Bleriot propeller stated to be "flexible." It also refers to a Bleriot propeller stated to be "flexible." It also refers to a before viriable with having hollow aluminum flexible before viriable with having hollow aluminum flexible before viriable or propeller stated to be "flexible." It also refers to a before viriable or propeller stated to be "flexible." It also refers to a flexible viriable or propeller stated to be "flexible." It also refers to a flexible viriable vi

54. The German publication "Der Motoreagen," published September 10, 1900 (detendant's exhibits 165 and 165A), contains a drawing and description of the Blerich propeller and its principal dimensions. The blades are attached to sheet steel metal arms by means of rivest. The blades themselves are stated to be hammered out of shambout behaviors are stated to be hammered out of shambout blades are attached to be hammered out of shambout blades and trailing edges, and slightly rounded off at the tips.

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lightness and strength of each metals.

65. The prior publication "Whichieles of the Air," published 1909 (defendant's chilbit 167), discloses an illustration (Figure 99) of a four-bladed aeronautical propeller mounted on an engine. This propeller is stated to be a four-bladed R. E. P. (Robert Ennault-Patters) construction driven by a R. E. P. engine and having blades of magnatim featured into steel arms.

On page 269 of this publication, magnalium is referred to as one of the best of the aluminum alloys which is both lighter and stronger than pure aluminum and lends itself readily to easting, forging, stamping, and machining.

57. The prior publication "The Aerial Age Weekly," published December 1918 (defendant's exhibit 170), contains an article entitled "The Metal Airscrew." This article refers to steel, aluminum, and duralumin as suitable materials for

aeronautical propellers.

58. The French patent to Drzewiecki, No. 519,759 (de-

fendant's exhibits 169 and 169A), discloses an aeronautical propeller having blades of constant thickness and width. The patent states that the object of the present invention is to design a blade made of metal, preferably of duralumin, which is superior to any other metal, so as to permit the construction of a lighter propeller for the same blade width and

thickness.

The patent indicates that the propeller is of the compensated type, stating that the same is bent to a compensated curve established in such a manner that the moment of pressure on the blade is approximately balanced by the moment of the centrifusal fores at every point. 59. The publication "Theoris Generale de l'Helics," by S. Drzewiecki, published by Gauthier-Villars et Cie, at Paris, France, and placed on sale in France on December 20, 1919 (defendant's exhibits 193 and 198A), is a publication relating to the general theory of propellers.

Chapter VIII contains a discussion of the mechanical resistance of an acronautical propeller to centrifugal force and thrust. Certain formulae are set forth in connection with a compensated propeller, it being stated that "it can be so arranged that the bending moment for each transverse section of the blade is mullifeed by an equal and opposing noment due to the centrifugal force; in this way one will obtain a commeasted propeller.

This publication sets forth certain data to be used in connection with the formulae for calculating the factor of safety for a propeller made of duralumin.

## PRIOR PUBLIC USE

60. In 1910 at Pawtucket, Rhode Island, Stuart Bastow publicly used ans accessfully flew a lighter-than-ris aircraft. This aircraft was propelled by means of a metal acronatrical propeller constructed by Stuart Bastow and Victor W. Page. An article written by Page and published in the New England Automobile Journal on November 29, 1910, describes the flight and contains a photograph of the airship and the propeller.

This publication, defendant's exhibit 103, which is by reference made a part of this finding, describes the propeller as being 6 feet 9 inches in diameter with the blades set so that a pitch of 5 feet per revolution was obtained, and states that the materials used in its construction were steel and aluminum, weighing but 12 nounds.

The original propeller is in evidence as defendant's physical establish 105. It is a two-bladed propeller and consists of an aluminum hub into which two pieces of steel tubing are screw-threaded. The end of each tube is flattened, and the blades of the propeller which are made of aluminum sheets are attached by rivets to the flattened tubing.

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	chemicat ain	analysis	oī	the	propeller	shows	the	same	to
	Copper							per cer	

dental impurities in the aluminum.

61. Prior to May 26, 1920, the filing date of the first Reed

patent in suit, it was known by propeller designers and those skilled in the art that—

(a) an aeronautical propeller should be as light in weight and have blades as thin as possible concomitant with ample strength and resistance to wear and fracture;

(b) both wood and metal were suitable materials of which to construct an aeronautical propeller, and both had

been used;

(c) the action of centrifugal force and the bending stresses in both wooden and metal propellers were known, and numerous formulae had been developed for computing the

merous formulae had been developed for computing the effects of centrifugal force and bending stresses.

62. It was known to those skilled in the art prior to 1920,

that aeronautical propellers of both wood and metal could be designed as—

(a) a radial propeller with blades having the centers of

(a) a radial propeller with blades having the centers of gravity of their sections on a straight radial line;

(b) as a compensated propeller with blades which were tipped forward of a straight radial line.

In both types of propellers the action of centrifugal force was known and utilized for the reduction of deflections and stresses due to the air loads, and the use of centrifugal force or dynamic rigidity to relieve the blades from the effects of the air load extended from a partial dependency to a dependency of 100 percent as in the case of a compensated type of propeller.

It was also known that by using centrifugal force to relieve the stresses due to the air load, the blades could be made light and thin. 63. It was known to those skilled in the art prior to May 26, 1820, that propeller blades should be relatively thin and tapexed in thickness and width toward the tip, and that a blade should be made sufficiently heavy throughout all its cross section to maintain its shape and its pitch under load and torsional stresses.

and torsumal stresses.

48. Prior to May 26, 1920, the date of the filling of the first patent in suit, and prior to August 30, 1921, the date of conception and reduction to practice of the concept embodied in claims 11, 12, and 13 of the second patent in suit, it was known to those skilled in the art that aluminum and forged alloys of aluminum, such as duralumin and magnalium, were satisfactory building materials for secondarial propellers satisfactory building materials for secondarial propellers.

The physical characteristics of these materials were well known and published prior to the above dates, and the use of aluminum or alloys of aluminum, such as duralumin, complished no new or unexpected results, and the use of these materials amounts to no new discovery of novel and previcusly unknown materials for aeronautical procedlers.

For convenience, claims 11, 12, and 13 of the second patent in suit are again quoted as follows:

11. An aeronautical propeller having blades formed of an alloy of aluminum.

12. An aeronautical propeller having blades formed of duraiumin, 13. An aeronautical propeller having blades formed

 An aeronautical propeller having blades formed of forged alloy of aluminum.
 The phraseology of these claims does not specify any-

thing previously unknown to those skilled in the art and these claims are not directed to novel subject matter and are invalid.

65. Claims 1, 2, 3, 4, and 13, the claims in suit of the Reed patent No. 1,463,556, are invalid and not infringed.

Claims 1, 5, 14, 15, and 16 in suit of the Reed patent No. 1,518,410, are invalid and not infringed.

Claims 11, 12, and 13 of the Reed patent No. 1,518,410, are invalid, 262

Oninion of the Court The court decided that the plaintiff was not entitled to recover

JONES, Judge, delivered the opinion of the court:

Plaintiff seeks to recover for alleged infringement of two patents granted on application of Sylvanus A. Reed for improvements in "aeronautical propellers."

The first Reed patent is directed to certain principles involving the utilization of the effect of centrifugal force in order to give the propeller blades the rigidity necessary to resist the stresses in the blades. The second Road patent is in general similar to the first patent, but relates more particularly to metal propellers and the use of certain alloys for their construction. Plaintiff alleges that both patents are infringed by the manufacture by or for and use by the United States of aeroplane propellers embodying the inventions covered by such patents.

Defendant contends that neither patent in suit gives sufficient information to enable those skilled in the art to practice the alleged invention; that the defendant does not infringe either patent, and that neither patent discloses any feature of novelty in view of the prior art.

The essential facts established by the record in this case are fully set forth in the findings, and except in connection with the controverted issues it is unnecessary to refer to them in detail.

Both of the patents in suit became the property of plaintiff: the first by assignment and the second by assignment of application and the subsequent issuance of patent direct to the company.

Findings 7 to 20, inclusive, have reference to an aeronautical propeller and the forces which act upon it in its operation. The forces and stresses which have particular bearing upon the patents in suit and the issues before us are graphically set forth in the drawing included in Finding 12, it being illustrated therein how the thrust or pull of the propeller blade has a tendency to bend the blade forward, and how the centrifugal force, which acts in the plane of rotation of the blades, has a tendency to counteract the bending effect of the thrust.

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The co-action of these two forces, as described and illustrated to the findings, has been, is, and always will be present tracted to the findings, has been, is, and always will be present and the effects have been recognised for many years. In this connection we refer to the following quotation from the French patent to Pennaul and Gaucho (Finding 41), issued February 16, 1876, which discloses an aeropiane having the contraction of the contractio

The centrifugal force of these screws will contribute powerfully to prevent them from yielding under the pressure that the air exerts on them.

In other words, what is graphically shown in Finding 12 was known as early as 1876,

THE FIRST PATENT IN SUIT (REED PATENT 1,468,556)

A discussion of this patent requires consideration of two aspects: First, the disclosure of the alleged improvement contained in the specification for the purpose of enabling one skilled in the art to practice the invention, and, second, the alleged monopoly claimed by the inventor as novel features of his invention, predicated upon the phraseology of the claims in sair.

Section 4888 United States Revised Statutes provides that the inventor of an invention

In the introductory portion of the specification the inventor makes the following statement:

My invention relates to propellers for air craft and flying machines and discloses a novel principle for obtaining the necessary rigidity of the propeller blades to rease the stresses, thereby making possible the use of millioners with a gain in efficiency with a gain in efficiency and the property of the property of the property of the stresses. Heretofore aeronautical propellers have been made of material used as wood or metal constructed to be structurally rigid against operative stresses, such as resi, to resist tampental axial and radial stresses which would occur in full speed operation. It is obvious extensive the structural registration of the structural contribugal force adds to the structural rigidity due to rigidity from the radial tension due to enterfugal force, and this added rigidity is a contingent obvariance, but habetto net regarded as an element which would patter

providing state or intrinsic rigidity.

This quotation indicates that the seeme of Ree'dt thought is that the stiffening effect the to entringual action is obvious, a statement well borno out by the Pensul and Gauchot patent of 1876, but that those skilled in the art as exemplified by propeller designess have not taken this stiffening effect into consideration for the purpose of omitting any considerable sure to both an inflicient rigidity in operation. The natentee sure to obtain sufficient rigidity in operation. The natentee

then goes on to state that at high rotative speeds the centrifugal effect increases, and that he has ascertained by many experiments that at certain speeds the structural rigidity can be discarded to a substantial centen, and reliance placed mainly upon the stiffening effect due to centrifugal force. The patente further states that this "can be easily calculated from well known laws of mechanics."

The allesed discovery or urinchine which the investor at-

tempts to teach the public by means of the specification is dependency upon the contributing effect of centrifugal force to a degree or extent previously not contemplated by the propeller designer. This degree is defined by the following vague and indefinite statements contained in the specification.

On page 1, lines 15-17, it is stated with respect to the disclosure of the alleged novel principle, that it makes "possible the use of much thinner blades than heretofore with a gain in efficiency."

On page 2, lines 108-104, the specification states:

I make my improved blade relatively thin and thinner than customary throughout \* \* \*. 304

Opinion of the Court The specification also states on page 3, lines 59-64:

The term relatively thin as used herein, is intended to define a body whose maximum thickness is that of a metal plate as distinguished from the thinness of a metal sheet, on the one hand, and the thickness of a metal bar or like bulky body, on the other,

The term "thinner than customary" and the term "thinner blades than heretofore used" are both as difficult and obscure in definition as is the difference between a metal plate as distinguished from a metal sheet. To predicate a disclosure to those skilled in the art upon such indefinite phraseology gives no help or aid to the propeller designer skilled in the art, who is entitled under the patent statutes to such a sufficiently clear disclosure by the specification as will enable him to know what propellers might be safely used or manufactured without practicing the Reed invention or discovery and which might not, and to arrive at this knowledge without the necessity of experimentation.

Referring next to the monopoly asserted in the claims in suit of the first Reed patent, these are fully set out in Finding 23. For the purpose of their consideration, as the claims are more or less similar in character, it is sufficient to quote claim 1:

1. An aeronautical propeller having single piece blades constructed of material of such thinness as to require dependence partly but mainly upon the radial tension exerted by centrifugal force to maintain the blades in operative form or shape. [Italics ours.]

The only distinction which the claims attempt to make with respect to the prior art is one of proportion, and the phrase "partly but mainly" used by the patentee is for this purpose.

The prior art pertinent to this first patent is set forth in detail in Findings 42-45 and 47-52, inclusive. We have already made reference to the Penaud and Gauchot patent of 1876, and its reference to the contributing stiffening effect of centrifugal force contained therein. Entire dependency upon centrifugal force to produce dynamic rigidity is taught in the United States patent to von Parseval (Finding 50), in which the blades were made of fabric and entirely devoid of structural or inherent rigidity.

#### Opinion of the Court

Partial dependency upon centrifugal force is suggested to those skilled in the art by the German publication "Luftschrauben" (Finding 52). This article includes the statement

 For this reason, semi-stiff propellers have been built recently, whose arms are not so limp as to collapse entirely, when standing still, although their stiffness is yet so, when standing still, although their stiffness is

yet so small that a considerable centrifugal force is needed to produce the necessary thrust. The publication "Technische Berichte" (Finding 48), discloses mathematical calculations and formulae and states

closes mathematical calculations and formulae and states that the approximate blade tip deflection having been determined, the comparative importance of the relieving noments of centriqual force can be seen from a mathematical equation set forth by the author. The publication convisible that the second of the publication conwhich the deflection of the blade remains and equations in which the deflection of the blade relieved to the contrifugal force is total of about 25 or 30 percent. With this noise art to which we have specifically referred,

which has prior are to which we have specifically reserved, so well as the other prior art set forth in the findings, as a background, the words "partly but mainly" used to define an alleged novel principle of dependency upon centrifugal force are far from clear in their meaning. The word "partly" possibly creates a line of demancation between the United States patent to von Parseval but does not with respect to the other prior art referred to.

other prow at referred to.

The word "manip" probably implies that the claims define
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There are two limiting considerations in the design or construction and operation of my improved construction of propellers—first, the limit of rupture, andsecond, the limit of propeller efficiency measured by the

ratio of thrust at stated flying velocities to torque. The patent monopoly, instead of being expressed in concise and exact terms in accordance with the statute, is left largely

to the individual opinions of various propeller designers, and the lack of any definite criterion indicates that various persons would interpret the claims differently, and therefore they are ambiguous. We are of the opinion that this patent does not fulfill the requirements of the patent statutes and is therefore void.

In General Electric Co. v. Wabash Appliance Corporation et al., 304 U. S. 364, 369, the court said:

Patents, whether basic or for improvements, must comply accurately and precisely with the statutory requirements as to claims of invention or discovery. The limits of the patent must be known for the protection of the patentee, the encouragement of the inventive genius of others, and the assurance that the subject of the patent will be dedicated ultimately to the public. The statute seeks to guard against unreasonable advantages to the patentee and disadvantages to others arising from uncertainty as to their rights. The inventor must "inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not."

See Isham v. The United States, 76 C. Cls. 1, and Hamacek

Marine Corporation v. The United States, 88 C. Cls. 369. In addition to lack of clarity in the specification and claims, it should be observed that the claims obviously purport to cover a wide range of possible propeller blades, sizes, speeds, and engine-power combinations, as well as a variety of propeller materials, and that neither the claims nor the specification give any exact sizes, dimensions, or formulae for their determination. The prior art previously referred to includes many suggested propellers, together with formulae, the use of which will permit the propeller designer to rely to any desired extent upon the beneficial effects of centrifugal force, and we do not believe that there is invention in the claims in suit of this patent.

Opinion of the

Taking up next the issue of infringement, the specifications and data relative to the Government propeller charged as infringing in this case, are set forth in detail in Finding 42. This is an aluminum alloy propeller 9 feet in diameter, designed to be normally operated at 2,200 r. p. m. with an engine output of 528 h. p.

The calculations which deal with tip deflections indicate that if defendant's propeller be theoretically contemplated as operating under the stipulated conditions of power and air load, but without any effect of centrifugal force, the tip deflection would be 1.41 inches, and the calculated tip deflection with centrifugal force present under the stipulated operating

conditions would be 0.455 inches.

The theoretical tip deflection of 1.41 inches without the effect of centrifugal force is less than 4% of the diameter of the propeller (108 inches) and the aerodynamic efficiency of the propeller would not be measurably impaired by such deflection.

Therefore, in so far as tip deflection might be regarded as a criterion with which to measure the restoring effect on centrifugal force, this propeller is not at all dependent upon centrifugal force to maintain its rigidity, and there would be no infringement from this standpoint.

In the present instance, however, plaintiff utilizes as a criterion or measure, the allowable ask limits for stress in this propeller, which is 19,000 pounds per square inch. The maximum bending stresses occur at 50 inches from the axis of the hab of the propeller, and the calculations indicate that under the normal operating conditions of the propeller, but under the normal operating conditions of the propeller, but under a 5800 pounds per sparse inch. As this value is below the about, the bending stresses at this point, due to air load about, are \$800 pounds per square inch. As this value is below the safe stress limit of 12,000 pounds, the Government propeller in not mainly dependent upon centrifugal force for a reduction of stresses below the safe operating value, and the claims in issues are not infringed with this stress value used as a

In actual operation of the propeller, however, centrifugal force is and must always be present. It can be stated that the

Opinion of the Court action of centrifugal force has what might be termed both a

beneficial and a detrimental effect, or, to use conventional bookkeeping parlance, centrifugal force requires an entry on both the debit and credit sides of the ledger. The detrimental or debit item is the additional tensile stress added to the blade by virtue of its rotating mass, and in the Government propeller this gives an added or direct tensile stress of 6.510 pounds per square inch. The beneficial or credit effect of centrifugal force is that the propeller is not bent or deflected to the degree it would assume with the air load alone, but to an intermediate degree in which the tensile bending stress due to air load is 2.830 pounds per square inch instead of 9.880 pounds per square inch, the figure previously given for the maximum stress due to air load alone when the propeller was theoretically contemplated as functioning without any effect due to centrifugal force.

The action of centrifugal force in the Government propeller therefore contributes a net resultant reduction in tensile bending stress from 9.880 to 9.340 pounds (air load stress 2.830 plus centrifugal force stress 6.510), which is a reduction of 5.46%. What we have stated here is graphically shown in the drawing entitled "Effect of bending stresses with and without centrifugal force" and forming a part of Finding 35. Calculated in this manner there is no main reliance upon the stiffening effect of centrifugal force. Plaintiff has taken an exception to Finding 35 and the draw-

ing contained therein on the ground that the method of computation is erroneous. Plaintiff's suggested computation is based upon a total tensile stress figure of 16,390 pounds obtained through the addition of the bending stress of 9.880 pounds present due to air load alone, the value obtained when the propeller is theoretically contemplated as operating without any effect due to centrifugal force, plus a direct tensile stress of 6,510 pounds, which is direct tensile stress due to centrifugal force, or what we have previously termed the detrimental or debit effect of centrifucal force. Plaintiff then compares this total figure of 16,390 with the final resulting stress on the propeller with centrifugal force present of 9,340 pounds, and by proportionate comparison of these two figures argues that there is resultant reduction in tensile bending stress of 71.4%, i. e., that the Government propeller depends mainly upon the contribution of centrifugal force.

Such calculations are clearly in error. In the first instance, it is improper to add the direct tensile stress, due to centrifugal force, of 6,510 to the bending stress due to unrelieved air load. In doing this, plaintiff is using the debit side of the bookkeeping account with respect to the item of centrifugal force, and is neglecting the credit side. Second, when centrifugal force is contemplated as being present. as it must be to obtain the direct tensile stress, due to centrifugal force, of 6,510, the bending stress due to air load is not and can not be 9,880, for the presence of centrifugal force will prevent deflection of the propeller to an extent necessary to obtain this value; and third, the total stress figure of 16,390 pounds used by plaintiff is in itself erroneous. in that when the propeller is contemplated as operating without any relieving effect or any centrifugal force whatsoever, the bending stress of the Government propeller due to air load alone under these conditions is only a maximum of 9.880 pounds.

It is our opinion that claims 1, 2, 3, 4, and 13, the claims in issue of the first Reed patent in suit, even if they were not invalid, are not infringed by the Government structure.

THE SECOND PATENT IN SULT (REED PATENT 1.518,140)

This patent is in general similar to the first patent, being also directed to an aeronautical propeller so designed as to be

dependent upon centrifugal force for its effective operation.

The specification differs from or supplements the description contained in the first patent in two main respects, first, in that it discloses the thought of tapering the blades in width as well as thickness from the hub to the tip, and second, in that it discloses metal blades made of a specific material, such

that it discloses metal bildes make of a specific material, such as alloys of aluminum and duralumin.

In addition, the specification refers to the necessity of making the blades strong enough to maintain rigidity of the blades against the change of pitch. In order to do this, the

blades against the change of pitch. In order to do this, the patentee states that "there is needed a correct adjustment of the weight of the material to dimensions and form at the the blades against change in pitch.

Opinion of the Cent successive blade cross sections." The effect of torsion stresses is fully set forth in Findings 14-18, inclusive, and it is sufficient to state that these are the stresses to which the patentee has reference when he refers to maintaining the rigidity of

The claims relied upon by plaintiff may be divided into two groups, the first group, comprising claims 1, 5, 14, 15 and 16, being directed to the constructional features of lightweight metal propellers, and claims 11, 22 and 18 being directed to the material or composition of a propeller blade Claims 1, 5, 15 and 16, which are set out in detail in Finding 96, contain the following defining phraseology with reference to the utilization of centrifueal force:

Claim 1 \* \* \* depending partly but mainly upon centrifugal force for effective operation. Claim 5 \* \* but has to be supplemented for an essential part by the kinetic rigidity resulting from the

centrifugal force.

Claim 15 \* \* \* being such as to require the supplemental stiffening action of centrifugal force for

operation.

Claim 16 \* \* \* depending upon centrifugal force for effective operation.

Insofar as these claims specify the degree or extent to which centrifugal force is employed, they fail to define a patent monopoly with any more clarity than similar type of claims of the first patent.

We have already discussed the lack of dependency upon centrifugal force to any great extent by the Government propeller, and the failure of a claim containing phraseology of this indefinite character to comply with the pasent statutes of the indefinite character to the comply with the pasent statutes has should manufacture or use within or outside of the patent monopoly. What we have previously stated with respect to the first patent in suit also applies to claims 1, 5, 15 and 13 or of the accord patent. These claims are not infringed and of the accord patent. These claims are not infringed and

Claim 14 of the second Reed patent is directed to a metal aeronautical propeller with blades increasing in cross-section from the tip toward the hub and containing the limiting phrase "graded in width and cross section only to the extent necessary to maintain the pitch twist of the blades."

An accountical propeller with blades increasing in crosssection away from the outer portions and toward the hub is disclosed in a drawing included in the prior at publiction. A vinition and Acromatutical Engineering, "available to form a vinition of the property of the property of the filling date of the second potent in sait (see Finding 49). The above quotation from this claim is indefinite as for esaning, for the patent specification gives no criterion as to power input or speed to which this limitation is applicable. Does this phrase contemplate on some allower and propeller speed or such as midtel by present in a power dively.

We find it impossible to visualize what kind of a bridge an engineer would build if he were given a contract to construct a bridge designed in "cross-section only to the extent necessary to maintain" the bridge. Would this mean that if the normal expected load was 4 tons he would build a bridge that would collarse if a vehicle weighing 8,005 pounds attempted to cross it, or would be ask us what factor of safety we desired in such a bridge, or would be follow conventional construction and build the bridge so that it might successfully resist a load of 8 tons without collapse, and thus have a factor of safety of two? Certainly if this latter construction were followed, the bridge would no longer conform to having "a cross-section only to the extent necessary to maintain" a 4-ton load. We have used this simile to better emphasize the difference between the Government propeller and this particular phraseology of claim 14. As set forth in the findings and in particular in Finding 38, the Government propeller which is designed to rotate in normal operation at 2,200 r. p. m. with an engine output of 525 h. p. is constructed strong enough not only to maintain its pitch twist under these stipulated conditions, but in addition has an ample factor of safety, in that the whirl test of this same propeller indicates a smooth thrust curve up to 2,400 r. p. m. with a power input of 1.152 h. p., or more than twice the normal power input. We are therefore of the opinion that this claim also comes within the category of indefiniteness with respect to patent monopOpinion of the Court
oly, and is invalid, and that the Government propeller does

not infringe this claim.

The claims in issue of the second patent, which are directed to the material or composition of aeronautical propellers, are se follows:

11. An seronautical propeller having blades formed of an alloy of aluminum.

12. An aeronautical propeller having blades formed of duralumin.

 An aeronautical propeller having blades formed of forged alloy of aluminum.

Duralumin was originally a trade name for one or more alloys of aluminum developed by a Dr. Wilm in Gernamy about 1906. The usage of the term "duralumin" has now become more generic and is now understood by those skilled in the aeronautical art as meaning in general a lightweight aluminum liby. As thus used the term is applicable weight subminum liby. As thus used the term is applicable propoller, and the plurascology of the three material claims is also applicable to the Government structure.

The scope of these claims is such that they would be infringed by any acconautical propoller made of the material specified, whether solid or hollow, and irrespective of the dimensions, power or shape characteristics of the same, and anyone constructing an acconautical propeller of any type and using materials specified would invade the monopoly which they are intended to express.

We are of the opinion that these claims express no patentable invention. Prior to August 30, 1921, the date of the inventions embodied in these claims, it was known and had lean suggested to those shilled in the art of propeller construction and design that aluminum and forged allows and the superior of the second of the second of the anal lightness, were satisfactory building materials for aeronautical propellers, and the physical characteristics of these materials were well known and published prior to this date.

The various prior art publications which refer to the use of duralumin and forged alloys of aluminum for propeller construction are referred to in detail in Findings 52-58 inclusive, and it is unnecessary to again set forth all of them

#### Opinion of the Court

in detail. We, however, make specific reference to a German publication, "Luftschrauben," published in 1912 (Finding 52), in order to better answer plaintiff's argument with respect to the material claims. This publication is an article entitled "Book of Instruction for the Construction and Treatment of Propellers" and discloses the stresses upon the blades of aeronautical propellers with reference both to centrifugal force and the deflecting moment of the thrust. The article also suggests that aluminum may be employed for the blades of a propeller, this being utilized by means of forming dies. The article sets forth a table of strength values for propeller materials, which includes pure aluminum, aluminum alloys, and duralumin sheet, forgings and pressings.

Plaintiff urges that this prior publication merely suggests duralumin as a material and does not instruct those skilled in the art how to construct a propeller of this material. The answer to this is found in the successful flight operation of the Bastow aluminum aeronautical propeller in 1910 at Pawtucket, Rhode Island, the details of which are set forth in Finding 60. With workmen sufficiently skilled in the art in 1910 to successfully construct and operate an all-metal propeller having aluminum blades and with the numerous formulae directed to propeller design and propeller characteristics, it would be but a step in degree and within the knowledge of the propeller designer to construct a propeller of aluminum alloy or alloy forgings once the suggestion of its use for this purpose has been made, and the strength and weight characteristics of the alloy are known.

Cases too numerous to cite indicate that it is within the skill of the trained workman to do many things. He may reduce weight; he may increase the size of parts; he may make parts stronger by the substitution of one familiar material for another; he may make them lighter or heavier, or he may divide one part into two, or combine two parts into one. Plaintiff further urges that a presumption of patentability

should be based on the fact that the metal propeller did not come into successful and normal use until after the Reed inventions. Such a presumption sometimes has a controlling influence, but this is only true when the question of invention 314

For these reasons we are of the opinion that claims 11, 12, and 13 express no patentable invention, and are therefore invalid.

sumption due to commercial adoption. The petition is accordingly dismissed. It is so ordered.

Madden, Judge: Littleton, Judge: and Whaley, Chief. Justine, concur.

WHITAKER, Judge, took no part in the decision of this case.

#### CALLAHAN WALKER CONSTRUCTION COMPANY v. THE UNITED STATES

[No. 43102. Decided January 5, 19421\*

On the Proofs Government contract; decision of contracting officer confined to questions of fact .- Where the plaintiff entered into a written contract with the defendant for performing a certain amount of earth work on the construction of a Mississippi River leves. according to specifications; and where after the work provided for in the contract had been nearly completed the contracting officer for defendant issued an order for additional work and stated in the order that "neyment for additional vardage made necessary would be made at the contract price per yard:" and

1 The Cuno Expineering Corporation v. The Automatic Devices Corporation, decided by the Supreme Court November 10, 1941. (314 U. S. 84) "Defendant's petition for writ of certifrari granted by the Supreme Court May 11, 1942.

315

where the contract provided that if any changes were made in the contract an equitable adjustment should be made, which provision of the contract was disregarded by the contracting officer; it is held—

 That the defendant made no adjustment of plaintiff's claim and thereby breached the contract.

and underey orecases are construct.

2. That the determination of what is an equitable adjustment
is one of law and the contracting officer, nuthorized by the
contract to pass only on questions of fact, had no authority
to pass on said question of law.

3. That the decision of the contracting officer in his order that 'payment for aiditional yardage will be made at contract price per cubic yard" was that the contract price applied to the additional work and that this was not in any sense a deci-

ston upon a fact but it was in effect a conclusion of law.

3. That, the defendant having breached the contract by the
refusal of the contracting officer to make any adjustment, the
plaintiff could bring suit without taking any appeal, as the
contract provisions for appeal applied only the decisions of
the contracting officer on questions of fact; there was no
adjustment from which to take an appeal.

Same; implied contract.—An implied contract arose to pay the plaintiff the reasonable value of the extra work performed.

Same; agreement with subcontractor.—The agreement, as to the extra
work, between the plaintiff and its subcontractor had no bearing
unon the contract between the plaintiff and the defendant.

Same.—Where extra work is ordered by the proper officer of the Government, such extra work bieling necessary, and where it is accepted and used by the Government the Coart of Claims has held that there is an implied contract to pay the contractor the reasonable value thereof unless there is a povision in the contract directly forbidding payment in the circumstances of the case. United States v. Species, 51 C. Cls. 155; affirmed, 268 II. 8 IZ. 130. often

Some.—The question whether an equitable adjustment is made is for the court to decide.

The Reporter's statement of the case:

Mr. Robert A. Littleton for the plaintiff. Mason, Spalding & McAtee were on the briefs.

Mr. William A. Stern, II, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant.

The court made special findings of fact as follows:

 The plaintiff and defendant entered into a written contract dated August 27, 1931, whereby, for a consideration

Reporter's Statement of the Case of 14.43 cents per cubic yard plaintiff agreed to furnish all labor and materials, and perform all work required for constructing "about 3.881,600 cubic vards of earthwork" as described in paragraph 39.2 of Specifications No. 32/30, attached to the contract and made part thereof. Map, file No. 53/72, was also attached to and made part of the contract. The work was to be commenced within 20 calendar days after the date of receipt of notice to proceed and be completed within 460 calendar days from that date. The officer contracting for the United States was T. B. Larkin. Major, Corps of Engineers, District Engineer.

Copy of the contract, with the specifications and map, is filed in evidence and made part hereof by reference.

The plaintiff received from the contracting officer notice. Sentember 1, 1931, to proceed with the work, reading as follows.

You are hereby notified to proceed with work under your contract symbol number W eleven naught six engineer fourteen ninety one dated August twenty seven nineteen thirty one. Stop. Contract papers being mailed. Stop. Acknowledge.

The plaintiff had previously, August 25, 1981, been notified by the contracting officer that its bid on Lake Lee Setback items A to D inclusive had been accepted.

This fixed the date for completion of the work December 4, 1932.

2. Plaintiff's work was described in the specifications under Article 39.2. Among other things the contract provided:

(b) Borrow Pits: The material for the work shall be obtained from riverside borrow pits in accordance with paragraph 25 of these specifications, except that the bottom of the pits may be excavated on slopes steeper than 1 on 50, but not steeper than 1 on 25; and from existing levee where so indicated on map,

(d) False Berm: A false berm, 100 feet wide landside and 100 feet wide riverside, measured from the toes of the leves, shall be built between Station 5116+46 and Station 5119. False berm shall have level crown at grade of 118.0 ft. M. G. L. (Net) with side slopes of 1 on 2 from edges of crown to natural surface.

### Reporter's Statement of the Cone

3. Immediately after the opening of bids plaintiff notified the contracting officer by letter dated August 19, 1931, as to its equipment, as follows:

It is proposed to build this work with one new Boryrus electric tower with a twelve-yard backet, 30- foot heal tower, and one 6150 Monag-han draghine with a 105-foot town and a seven-cubic yeard spicial. We are promised delivery on the electric yeard spicial. We are promised delivery on the electric yeard spicial. We have been supported to start work by November 1st. The 6150 dengling has three months work to do in the Memphis District, making it a validable for this work December the first. In addition to this we will have two mail one and one-mail town the support of the second spicial way to be supported by the second spicial way to be supported by

4. The location of the work was alongside Lake Lee, which was a loop abandoned by the Missispipi River. The leves to be constructed was on the Mississpip State side of the river, near Wayside, and was to be set back landward a short distance from an existing levee, the earth from which was in places to be used in constructing the new level.

In usual Mississippi River leves construction earth is obtained from land between river and leves. Setting the new leves back to the landside of the old leves made more material available on the riverside of the new leves. Socalled "rights-of-way" were procured by the Government from which to excavate material for the new leves, additional to that, which might be utilized from the old leves.

The stretch of levee particularly here in controversy is from station 1511 to retain 5132, a distance of 1,000 feet. That part of the old levee which was alongside this particular stretch of new levee was available in its entirety for the project limit and the stretch of the particular than 1601-A, monitories of the stretch of the control of the stretch of the str

Reporter's Statement of the Case with a level crown at grade of 118 feet mean gulf level (net) with side slopes of 1 on 2 from edges of crown to natural surface.

5. During the progress of the work difficulty was expeienced in building the levee to the required height due to persistent subsidence. This situation was especially troublesome between stations 5123 and 5136.

As the levee subsided the surface in the riverside borrow pits correspondingly arose.

The plaintiff had begun work at the southern end, station 5336+54.5 and was working northward toward the north end, station 5081+28. Trouble with foundation failure had been first encountered at about station 5146, but the levee therefrom to station 5123, had been accepted for grade and section and from 5123 to 5113 had been about 68% completed when the contracting officer, being concerned over foundation failures and subsidences met with south of station 5123, ordered the plaintiff on October 7, 1932, to stop work at or about station 5123, proceed to station 5113 and work northward therefrom omitting work from 5113 to 5123 for the time being. His purpose in doing this was to give him time to investigate and determine upon measnres that would forestall subsidence between stations 5113 and 5123.

6. The plaintiff complied with the contracting officer's order of October 7, 1932, and proceeded to station 5113.

The contracting officer considered the situation between stations 5113 and 5123 and on October 18, 1932, issued the following order to the plaintiff, against plaintiff's objections that no extra price was allowed and that it was not within the contract terms, and with oral notice to the contracting officer that plaintiff would later assert a claim for extra costs occasioned by the change in work:

In reference to recent subsidence which occurred on your Lake Lee Setback, Item A, this will confirm instructions issued to you by the Central Area Engineer relative to the completion of your contract, as follows: (a) A riverside false berm will be constructed from station 5113 to station 5123 having a riverside crown elevation of 120 ft. M. G. L. at a distance of 250 feet from the centerline and sloping upward toward the Reporter's Statement of the Case

levee on a 1 on 18 slope and downward to the ground surface on a slope of 1 on 6.

 (b) The above berm shall be completed before doing any further work between stations 5113 and 5123.
 (c) You will be given credit for 100% of the embank-

(c) You will be given credit for 100% of the embankment south of station 5123.
 (d) If and when directed by the contracting officer.

the levee between stations 5123 and 5146 shall be sodded.

(e) Payment for additional yardage made necessary by the above instructions will be made at contract price per cubic yard.

The additional work so ordered by the contracting officer was necessary for the completion of the project.

Article 3 of the contract reads as follows:

ARTICLE 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

# Article 15 reads as follows:

Arricas Is. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his chip authorized the contracting officer or his chip authorized the contracting officer or his chip authorized tractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed. Reparter's Statement of the Case

7. Plaintiff's bid was in part based upon the use of towers. One tower, called the "head tower," is placed on the
levee site, and the other tower, called the "fail tower," is
head where the carth it to be obtained for the large." is

95 C. Cts.

leves site, and the other tower, called the "fail tower," is placed where the earth is to be obtained for the levee. A cable reaches from the tail to the head tower and the exawating shovel at the tail tower scoops up the earth and travels on the cable to the head tower, where it is deposited at will. Each tower is placed where its operating radius is most effective.

effective.

The use of towers does away with the necessity of trucking or drifting all the earth in from borrow pit to embankment or rehandling the same by relays of excavating equipment.

Under the original plans plaintiff would have had to drift in some material to its tail tower, due to the lack of sufficient suitable material directly in front of the new levee.

The enlargement of the riverside false berm required under the order of October 18, 1932, accessitated plaintiffs hauling or drifting in additional material to bring it within reach of the tail bower, over that required in the construction of the originally required work. Suitable material did not extend in dept to more than two or three feet in the borrow-pit area, and the territory possible of excavation for leven material, under the revised plan, was extended beyond

the limits contemplated by the contract.

The landside berm, stations 5113 to 5123, was constructed by Government forces, the plaintiff being relieved of the

work thereon required by the contract.

The plaintiff built the enlarged riverside berm, stations
5113 to 5123, under protest that no extra price was allowed
and, in doing the work, demanded, and has ever since de-

and, in doing the work, demanded, and has ever since demanded, of the defendant extra costs entailed by the enlargement.

 Plaintiff completed within the contract time all work required by the contracting officer.
 On Item A plaintiff placed 878,617 cubic yards of levee

On Item A plaintiff placed 878,617 cubic yards of levee embankment for which it was paid \$128,764.43; 68,974 cubic yards of riverside false berm between stations 5118 and 5123, under the order of October 18, 1828, for which it was paid \$8,851.94; and 18,945 cubic yards of false berm prior thereto Reporter's Statement of the Case

for which it was paid \$2,783.77, all at the rate of 14.43 cents per cubic yard, totals of \$159,370.14 and 965,836 cubic yards. The following table shows the cubic yardage of Items A, B, C, and D (1) as estimated in Article 39.2 of the specifications and (2) as actually haid down:

	Item	Estimated (i)	Placed (2)
L. Carrie	Lever Dorm Lever Lever Lever Lever	954, 250 29, 750 817, 300 29, 500 972, 300 955, 500	979, 617 87, 231 841, 041 28, 764 906, 233 902, 238
	Totals	3, 881, 000	3, 704, 09

Plaintiff was required to place and in fact placed 177,504 cubic yards less than estimated in the specifications, and has been paid for the cubic yardage of 3,704,006 the sum of \$334,601.07 at the rate of 14.43 cents per cubic yard.

The last payment made to the plaintiff was \$13,987.01, being percentages retained on Item A. The plaintiff endorsed the voucher for the amount: "Signed under protest as to additional payment due for extra work performed by us due to subsidence Item A."

 The embankment to the south of station 5123, referred to in the contracting officer's order of October 18, 1932 (finding 6), had been completed by the plaintiff to the required grade, but had not been dressed or sodded between stations 5123 and 5139. After being brought to grade the embankment subsided causing cracks to be opened up therein. This subsidence occurred on or about the night of October 6-7, 1939. Fearful that rain would wash down the cracks and aggravate foundation trouble, the contracting officer's representative ordered the plaintiff on or about October 11, 1932. to dress this section, stations 5123 to 5139, which was a levelling-off process preliminary to sodding, and this dressing was done by the plaintiff in three days of 12 hours each. between October 11 and 14, 1932. Thereafter plaintiff was relieved of sodding this section, and it was not sodded by the plaintiff.

Reporter's Statement of the Case Plaintiff used a Northwest dragline and bulldozers in dressing the section.

10. Plaintiff does not include in its claim handling of material by its tower machine. In constructing the enlarged riverside false berm plaintiff caused other equipment to be used in drifting in material to the berm or placing it within reach of the tail tower, an operation much of which would not have been necessary had the riverside false berm been confined to its original dimensions, and required the use of additional machinery furnished by a subcontractor as shown in the next paragraph. This work done by the subcontractor was not contemplated or required under the original contract.

This drifting or hauling in of the material was done by a subcontractor or the plaintiff and amounted to 45.895 cubic vards. For this work the plaintiff paid to the subcontractor, at the contract rate of 14.43 cents per cubic vard, \$6.622.65. The agreement between plaintiff and the subcontractor prowided that in the event that plaintiff was unsuccessful in its claim against the United States for compensation over and above the rate of 14.43 cents per cubic yard for the material so hauled by the subcontractor, the subcontractor would receive no more than 14.43 cents per cubic yard, but that if the claim was allowed the subcontractor would receive more than 14.43 cents per cubic yard.

The work of this subcontractor did not include the dressing and sodding of the enlarged false berm. The sodding and dressing was done directly by the plaintiff at a fair and reasonable cost to it of \$1.453.30. This is the cost of dressing and sodding the entire berm as constructed and there is no proof as to the excess over the probable cost of the originally designed berm. 11. The Government constructed the landside berm at sta-

tions 5113 to 5123 with its own forces, calling upon the plaintiff to construct the enlarged riverside berm on the other side of the levee. Plaintiff could not top out the levee stations 5113 to 5123 until both these berms were built. The tower machine had been moved up north of station 5113 in accordance with the contracting officer's order of October 7. 1932, and after accomplishing its mission tracked back to station 5113 October 28, 1932, ready to top out the leves 314 Reporter's Statement of the Care stations 5113 to 5123. At that time plaintiff had not com-

pleted the enlarged riverside berm and the Government forces had not completed the landside berm.

The landside berm was completed before the riverside

Working with and auxiliary to the tower machine was a 3-W Monaghan dragline, and this was idle whenever the tower machine was idle.

There is no satisfactory proof that plaintiff suffered any damage through the Government's operations in constructing the landside berm stations 5113 to 5123.

12. On December 28, 1932, the plaintiff filed a claim with the contracting officer for \$16,952.79. The items included therein relevant to the items here sued on, are summarized therein as follows, 10 percent being added to the total "for

use of tools and general supervision." Item A. Building riverside false berm. Oct. 15th to

29th, inclusive, between stations 5113 and 5123, with Caterpillar tractors, wagons, and two 1% cu. yd. line londing wagens:

2,200 Cat wagon hours at \$4.50 509 Dragline hours at \$6.75 per hr .....

14 948 95 Lees 45,895 cu. vds. which was allowed

Item D. Rehandling earth with our 7½ cu. yd. 160' boom Monaghon dessition de from pits by tractor units building riverside false berm:

116 machine hours from Oct. 31st to Nov. 5th, inclusive. 4, 390, 45 Item E. Filling cracks and depressions in subsided levee with NW 1% cu. yd. dragline; also A. C. Bull-dozer between stations 5123 and 5168. Oct. 11th to Oct.

14th, inclusive: 

418 50 Item F. Labor dressing riverside false berm: NW 1% cu. yd. dragline, 44 hrs. at \$6.75... \$297, 00 Labor and Bulldoner operation 645. 55 049 88

This claim has not been paid in whole or in part.

There is no dispute between the parties as to the time required by the subcontractor for doing the work described in Opinion of the Cert

Item A and Item D of this bill and the evidence shows that
the price stated as the value of the use of the equipment and
the work done by it as shown in these two items was reasonable and fair. The Monaghan dragline used was of more

than usual capacity.

The proof fails to show that Item E included work not contemplated by the original contract and Item F is excluded under the last sentence of Finding 10.

The evidence shows that ten percent of the value of the equipment used as shown in Items A and D was a reasonable and customary charge for the use of tools and supervision in connection with the work so done.

The court decided that the plaintiff was entitled to recover.

A ne court decided chac the planton was envired to recove

GREEN, Judgs, delivered the opinion of the court: It appears that the plaintiff entered into a written contract with the defendant for performing a certain amount of earth work according to specifications attached, this work being in the construction of a leven

After the work provided for in the contract had been nearly complicted, to contracting office of definidant issued an order for the construction of a riverside blue bern as for a finite contraction of a riverside blue bern as for additional variety and the mass at the contract price per yard. This additional work ordered was not contemplated or required under the original contract, when the contract price per yard. This additional work ordered was not contemplated or required under the original contract, when the contract price per yard. This additional work ordered was not contemplated or required under the original contract, when the property description of the price of

contract price.

The order made by the contracting officer unquestionably changed the centract and increased the amount due under it. The contract and increased the amount due under it. and within the general except theoret and the contract provided for changes being made but Article 3 (see finding or provided that "It such changes cause an increase or decision for a mount due under this contract, or in the time-required for its performance, an equilable adjustment shall be under the contract of the provided that "It is the changes cause in increase or described and the contract of t

ingly." The contracting officer paid no attention to the provision quoted above but required the plaintiff to perform the work in accordance with his order, although the change made a large increase in the amount due under the contract.

This we think was clearly a breach of the contract. As against this conclusion it is argued that Article 3 provided that "Pro change involving an estimated increase or decrease of more than \$500 shall be ordered unless approved in writing by the head of the denartment or his duly authorized

representative."

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It is said that this provision was not complied with, but the contracting officer who made the contract and the order for additional work was the "duly authorized representative" of the department and has so been treated in all of our decisions. As he ordered the change he must have anproved it. It is also said that the plaintiff was not obliged to comply with the order if it was unauthorized but the order was authorized and the contract required the contractor to immediately proceed with the work in accordance with the order. It is quite evident that the order of the contracting officer fixing the contract price as a rate of payment for this additional work was not an "adjustment" required by Article An "adjustment" is a change to meet changed conditions. Here no change was made although the findings show clearly changed conditions which made the additional work more costly not merely in quantity but per yard. In view of this fact, it is clear that it was not an "conitable adjustment" for no allowance whatever was made to the plaintiff on account of the additional cost per yard. Moreover the reading of the order shows that the contracting officer was not making any attempt at adjustment or any pretense thereof. He simply

attempt at adjustment or any pretense theorof. Its simply health that the contract rise applied to the additional work done. Hers we have a case where the contracting officer not only refused to make an equitable adjustment but no adjustment whatever was made and certainly not an equitable edigistment. This was breach of Article 3, and by reason of digistment, as besend of Article 3, and by reason of this breach, the defendant was not entitled to any benefit from the remaining provisions of this articles. As the case stands, it is merely one in which the detectable signate carriered sidiltional such moved down that required by the contract. The findings show that this earth was so located that the cost of moving it would be much increased over the vardage price

stated in the original contract. It is especially urged, however, in the dissenting opinion that Article 15 provided that all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to appeal by the contractor It is argued that there was a dispute of fact involved in the order of the contracting officer and that when he stated that the plaintiff would be paid for the additional work at the contract rate, he was in effect saving that this was the reasonable value of the additional work ordered and that this was a question of fact which he had the power to decide.

We think it has been shown above that he was not deciding a question of fact and that his order cannot be so construed. He did, in effect, assert that the contract rate applied to the additional work ordered but this involved a question of law which he had no authority to decide. We have also held above that he not only did not make an equitable adjustment but made no adjustment whatever.

Where extra work is ordered by the proper officer which is necessary and it is accepted and used by the defendant we have held that there is an implied contract to pay the contractor the reasonable value thereof unless there is a provision in the contract directly forbidding payment under the circumstances of the case. The general provisions with reference to the naval contracts do not prevent the application of this rule, and it was held in United States v. Spearin. 248 U. S. 132, 139, that neither 3744 of the Revised Statutes, which provides that contracts of the Navy Department shall be reduced to writing, nor the parol evidence rule, precludes reliance upon a warranty implied by law. See Kellogo Bridge Co. v. Hamilton, 110 U. S. 108. United States v.

Spearin, nupra. It is difficult to find any case where the precise question involved in this case was discussed at length, although the controlling principles have been decided. It has been held heretofore in effect that the provision for equitable adjustment where a change was made in the contract which increased either the quantity or the expense of the work was a peremptory requirement and must be followed. The reason for this assumption is manifest, for if it were not an absolute requirement but left to the opinion or judgment of the contracting officer, it would be no protection whatever to the plaintiff and would permit the taking of plaintiff's work without commensation.

As no adjustment was made of the additional cost, the plaintiff under all of the authorities was not obliged to take an appeal or even to protest and without an appeal could bring suit to recover on an implied contract the reasonable value of the work. The plaintiff, however, did protest against the decision of the contracting officer that payment would be made under the contract rate.

would be made under the contract rate.

It should be observed in this connection that even if the contracting officer was intending to make on equitable adjustment of the price per yard (we think it is clear that he did not) this was not a matter upon which he was authorized to make a final decision. The Supreme Court has held in on make a final decision. The Supreme Court has held in most is not one of fact but one of law. See Case v. Lost Annote Learner, Co., 208 I. S. 10, 14, 11, 15, 19, 200 See V. Lost Annote Learner, Co., 208 I. S. 10, 14, 11, 15, 19, 200 See

ties Commission v. U. S. Realty Co., 310 U. S. 484, 482.

The question of whether an equitable adjustment was made would therefore in any event be one for this court to decide regardless of the form of the order of the contracting officer; and we have held above not only that the order was not an equitable adjustment but that there was no adjustment whatever.

whatever.

Although cause exactly similar on the facts cannot be cited, the case of the United States v. Smith, 1960 U. S. 11, 16, involves a similar question. In that case, the specifications provide that the decision of the engineer officer in charge provide that the decision of the engineer officer in charge interactions were supported to be observed by the contrastor. The contract further required that modifications of the work in character and quality, whether of balor or material, were

in character and quality, whether of labor or material, were to be agreed to in writing and unless so agreed to or expressly required in writing no claim should be made therefor. After part of the excavation had been made, it appeared that the material to be moved was of a very different quality

Opinion of the Court from that stated in the specifications of the contract much more difficult and costly to be excavated. The plaintiff then elaimed to be entitled to receive more for the work and an extra price for the reason that the quality of the excavation made it more difficult and costly than that specified in the specifications. His request for an extra price was refused and he was told if he did not proceed he would be regarded as in default. The evidence showed without controversy that the material was much more difficult to excavate than that described in the contract. A defense was set up based upon the provisions of the contract set out above but the Supreme Court said that this defense overlooked the uselessness of soliciting or expecting any change to be made by the contracting officer and that the right of the plaintiff "to recover the price for the work done is indisputable." In the case cited, the contracting officer was authorized to decide whether the quality of the work was such as to require a higher price but it was said that the action of the contracting officer was contrary to the provisions of the contract with reference to the material to be excavated. In the case before us, the new work to be done was also outside of the provisions of the contract and the refusal by the contracting officer to comply with the provisions of the contract with reference to its modifications rendered no appeal necessary.

The circumstances of the case before us are the same as in the Smith case, supra. The findings show that when the order was made, the plaintiff objected thereto on the ground that it was not within the contract terms and gave notice to the contracting officer that it would later assert a claim for extra costs occasioned by the change in the work, thus complying with the conditions of the contract. But as the contracting officer would not consider the plaintiff's claim or make any adjustment, it was not necessary that the plaintiff should take an appeal. The breach of the contract was complete when the contracting officer paid no attention to the objections and protests of the plaintiff against the order and refused to make any adjustment. Moreover the conduct of the contracting officer in refusing to consider plaintiff's repeated protests showed the uselessness "of expecting any change from him."

Opinion of the Court In the case of Rust Engineering Company, 86 C. Cls. 461. 476, 477, the contracting officer required the contractor to furnish a different and more expensive tile than was required by the contract and this court said that he thus obligated the defendant to pay the excess costs of the special tile, and that this action constituted a change in the contract which "required an equitable adjustment in the contract price by reason of the increased cost." Although the contract was exactly similar to the one in the case which we have before us and no appeal was taken from this order, the court held the defendant liable for the additional cost which plaintiff was required to pay for the tile demanded. The court said that this was not a dispute concerning a question of fact but one with reference to the construction of the contract, as the evidence showed without dispute that the tile was more expensive and presented the question as to whether under the provisions of the contract the plaintiff should be required to furnish a more expensive tile than the one desired and known to the trade and the parties at the time the contract was made. The court also held that the decision not being one of fact but a construction of the contract, no appeal was necessary. In the case before us the plaintiff was required to do work more costly in its operations than that required by the original contract. The two cases appear to be exactly parallel so far as the matters to which we have referred are concerned

In the case of Callaham Construction O.o. v United States, 91 C. Cls. 538, 611, a somewhat similar contract case in which the plaintiff claimed to be entitled "to be paid for the extra expenses incurred by reason of being required to perform certain specified units of work in a manner different from and more expensive than that contemplated and specified in the contract and specifications," the court scale in the contract and specifications," the court scale of the contract of the contract

Where an instrument, especially one of such character as is involved in this suit, is drafted and prepared entirely by one party thereto, and is specific in its detailed applicability of the language and protein meaning and applicability of the language and protein entire and dedinite facts, conditions, saturations, and circumstances should not be interpreted and construed in favor of the party who drafted and prepared it, but, on the contrary, in such cases the provisions of such instrument should, in case of doubt and in such circumstances, be interpreted more flavorably to the other party who did not and could not, in the circumstances, have anything to say as to the language and provisions of the instrument as prepared.

We do not think any doubt arises in the case but if there be any, we think that in fairness, justice, and the manifest understanding of the parties the rule laid down above would be applicable.

No finding is made that the decision of the contracting officer that the additional work should be paid for at the contract price was arbitrary or capridous and this is presented as one of the reasons why his decision should be hald final. We had no occasion to make such a finding. On the order as a matter of law, we hold that he was not decising a fact but merely issuing an order that the contract rates be applied to the extra work done probably in the belief that the contract authorized him so to do. This being merely his opinion, on the construction of the contract, could havely opinion, other construction of the contract, could havely such as the contract of the contract of the contract state in plegment, but in any event lead not such rather as included.

For the reasons stated, our conclusions are:

1. That the defendant made no adjustment of plaintiff's claim and thereby breached the contract:

That the determination of what is an equitable adjustment is one of law and the contracting officer who could only pass on questions of fact had no authority to decide it;

3. That the plain meaning of the language used by the contracting officer in his order that "Payment for additional yardage " " will be made at contract price per cubic yard" was that the contract price applied to the additional work, and that this was not in any sense a decision upon a fact but it was in effect a conclusion of law.

4. That the defendant having breached the contract by the refusal of the contracting officer to make any adjustment, the plaintiff could bring suit without taking any appeal, as the provisions for appeal applied only to the decisions of the

# Opinion of the Court

contracting officer on questions of fact. Moreover there was no adjustment from which to take an appeal.

What we have said above shows that an implied contract arose to pay the plaintiff the reasonable value of the extra work so performed. The defendant, however, objects to this conclusion and says that the plaintiff has sustained no damage because it has only paid the subcontractor at the contract rate of 14.43 cents per cubic yard which has been paid to plaintiff by defendant and that "The agreement between plaintiff and the subcontractor provided that in the event that plaintiff was unsuccessful in its claim against the United States for compensation over and above the rate of 14.43 cents per cubic vard for the material so hauled by the subcontractor, the subcontractor would receive no more than 14.43 cents per cubic vard, but that if the claim was allowed the subcontractor would receive more than 14.43 cents per cubic vard," (see finding 10), that by reason of this agreement the plaintiff has sustained no damage and is not entitled to recover anything above the contract price for the extra work

done. We do not think that the agreement between plaintiff and its subcontractor is any defense. The defendant's liability are contractual. Its implied agreement was to say the reason-agreed with plaintiff to do the work for nothing we do not think it would have invalidated this agreement. Certainly it would not have followed that the plaintiff could get nothing for this work from the defendant. The implied contract between defendant and plaintiff and the contract between defendant and plaintiff and the contract between contracts, and in our opinion the latter had no effect on the

obligations of the former.

At the time the change order was made, the plaintiff protested against it and notified the contracting offser it would ask for additional pays and when it was paid at only the contract rate, it again protested and filed an Itemized claim for additional work with the contracting offser amounting to different the contraction of the contracti

Concurring Opinion by Judge Whitaker recover for Items A and D which are for the extra work required. The charges in this bill are not made up by the number of cubic yards moved but in accordance with the value of the use of equipment used by the subcontractor in completing the work and the defendant is given credit for the payment which it made on the yardage removed. There is no dispute between the parties as to the time required by the subcontractor for doing the work described in Items A and D and we find the value stated in the bill to have been reasonable and fair also that ten percent in addition for the use of tools and supervision was a reasonable and customary charge. The value of the subcontractor's work and equipment included in Item A was \$14.848.25, under Item D \$4,390.45, making a total of \$18,788.70; 10% on this would amount to \$1.873.87 and added to the value of the work makes a total of \$20,612.57. From this should be deducted the \$6,622.65 which defendant paid thereon, leaving a balance of \$13,989.92 for which the plaintiff is entitled to judgment. It is so ordered.

WHALEY, Chief Justice, concurs.

### WHITAKER, Judge, concurring:

Warrans, Sunge, conserving:

you concur in the foregoing decline for this reason, heinfly
gooders in the foregoing decline for this retails it is that
you can be brigging about an increase or decrease in the
mount due under the contract "an equitable adjustment
shall be made." Under the authority of Case v. Los Angelet
Lamber Co., 308 U. S. 106, cited in the foregoing opinion,
and other cases, what constitutes an equitable adjustment is
elserly a question of law. (See pages 115, 114, 115, 115 and
110 of that opinion.) I think articles is and 15 gave no
decentrate to decide such questions or to the basic of the
decentrate to decide such questions.

Article 3 provides, "if the parties cannot agree upon the adjustment the dispute shall be determined as provided in article 15 herefo." But article 15 confers on the contracting officer and the head of the department the right to decide disputes only as to questions of fact. Hence, when a dispute arcse under article 3 and the parties were unable to agree, it

Dissenting Opinion by Judge Madden
was necessary to take an appeal to the head of the depart-

ment only on the questions of fact involved in the dispute.

There is no dispute between the parties in this case as to the facts. The only dispute concerns whether or not the amount allowed by the contracting officer for the extra work constituted an equitable adjustment, and this, as the majority opinion holds, is a question of law. Neither the contracting officer or the head of the department was given any right by the contract to decide each questions. If, by the contracting officer was equitable, it had a right to appeal to this court for rolled. The relief granted by the court is the relief to which I thin the planning is sufficient.

### Madden, Judge, dissenting:

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I do not agree with the opinion of the majority.

The contracting officer here concluded, because the new
levee in adjacent locations had subsided, that additional

support should be given to the leves to be built by plaint.

If. He thereupon advised plaintiff some days before
October 18, 1989, that the false berm to be erected between
he leves and the virer was to be enlarged beyond its dimensions as they were stated in the specifications. Plaintiff
protested doing this work, avaing that it was not not within
reach and that additional equipment would be required; that
the price per yard of earth moved should be more than 14-56
the price of the protection of the protecti

Here we have the situation contemplated in Article 3 of the contract (see finding 6). The contracting officer made a written change order and specified the prior which plaintiff should receive for doing the additional work. The change had already been discussed orally and plaintiff had made clear its position that it considered the prior too low. That protest was in the mind of the contracting officer when he set the price. Plaintiff made no claim for addustment

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334 CALLAHAN WALKER CONSTRUCTION COMPANY
Dissenting Opinion by Judge Madden
within ten days after the written change order w

within ten days after the written change order was made, at Article 8 required, but that is probably immaterial, as the matter had been orally discussed before the written change order was issued, and the contracting officer was aware of plaintiff's position. Both plaintiff's claim for adjustment and the contracting officer's adjustment therefore preceded the written order, but as indicated above, it think that is the fast that plaintiff presented no further claim to the contracting officer within ten days after receiving the change order as provided in Article 8 of the contract.

Article 3 further provides that after these steps have been taken "if the parties cannot agree upon the adjustment, the dispute shall be determined as provided in Article 15 hereof." And Article 15 is as follows:

Arraca 15. Dispute.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the particle thereto as to such questions of diligently with the work as directed.

Plaintiff did not appeal to the head of the department as the contract required. In plaintiff's reply brief it argues that this failure was a "pure technicality" which should not defeat its claim.

not defeat its claim.

I do not think that plaintiff can transfer its claim from the forum in which it expressly agreed that such dispatch should be decided to this court, nearly by neglecting or refusing to present to claim in the agreed forum. Size and the state of the court of the state of the state

Dissenting Opinion by Judge Madden Papeling Co. v. United States, 60 C. Cls. 699, 712), relief

would be available here. But where the agreed remedy has not even been pursued, there can be no assumption that relief would not have been obtained, if sought, We do not have here a situation like that in Smith v. United States, 256 U.S. 11. There the conduct of the con-

tracting officer, whose decision was, according to the contract, to be final, was described by the Supreme Court as "repellent of appeal or of any alternative but submission with its consequences." There the engineer officer required the contractor to excavate for 18 cents a yard material like that for which \$2.24 a yard was paid under another contract. Here there is no showing of arbitrary or threatening conduct on the part of the contracting officer, and the final

authority, the head of the department, was not appealed to at all. Here the contracting officer's decision as to the price was near enough to being right so that the plaintiff's subcontractor was willing to agree to do the work for that price if it turned out to be all that plaintiff received from the Government.

One basis for the opinion of the majority, and the sole hasis for the concurring opinion, is the conclusion that plaintiff was not obliged to appeal its disagreement with the contracting officer to the head of the department because that dispute concerned a question of law rather than a question of fact. I do not understand why the question whether fair compensation for moving earth from one place to another is 14.43 cents per yard, or some other number of cents. is a question of law. It would be a question for the jury in any suit where trial by jury was had. The language of the Supreme Court of the United States in Case v. Los Angeles Lumber Company, 308 U. S. 106, is relied upon in the majority and concurring opinions. By the terms of Section 77B of the Bankruptcy Act, 48 Stat. 911, 912, the question of what constituted a "fair and equitable plan" was to be decided by the court and not by various percentages of the security holders, and the Supreme Court so held. That opinion seems to me to use the phrase "question of law" merely as a short hand expression, meaning, as the court held, Reporter's Statement of the Case
that the question was one for the court under the statute,
The Case decision does not therefore seem to me to be helpful in our case.

For the reason that plaintiff did not pursue the remedy which, in the contract, it agreed to pursue and abide by, I would dismiss its petition.

Jones, Judge, concurs in this opinion.

LOUISE HARDWICK, ADMINISTRATRIX OF THE ESTATE OF WALTER S. HARDWICK, DECEASED, v. THE UNITED STATES

(No. 43428. Decided January 5, 1942)

On the Proofs

Generated contract, extra work not ordered by contracting officer— Where it was provided in the contract on which the luminatmat is brought that 'mo charge for any extra work or material will be allowed uncless the same has been ordered in writing by the contracting officer and the price stated in sada code; " and where it is allown by the evidence addrected that not only but the contracting officer and the price stated in sada code;" and where it is allown by the evidence addrected that not only but also plaintiff was informed that if done it would not be build for; it is added that the plaintiff is not entitled to recover.

The Reporter's statement of the case:

Mr. Robert A. Littleton for the plaintiff. Mason, Spalding & McAtee was on the brief.

Mr. William A. Stern II, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff is administratrix of the estate of Walter S. Hardwick, who died intestate January 14, 1996. The decedent, during the contract period here involved, was a member of the partnership of Erickson & Hardwick, which was composed of the decedent and Carl Erickson. Subsequent to the contract period Carl Erickson died and the partnership was dissolved. Walter S. Hardwick surviving.

Reporter's Statement of the Case 2. On November 17, 1932, the aforesaid Carl Erickson and Walter S. Hardwick entered into a contract with the defendant, represented by J. N. Hodges, Lieut. Col., Corps of Engineers, U. S. Army, as contracting officer, whereby the contractor agreed, for the consideration of 12 cents per cubic vard, place measurement, to furnish all labor and materials, and perform all work required for the construction of Kempe-Lake St. John Levee, Relief Levee Item R-674-C. containing approximately 1,000,000 cubic yards; Relief Levee Item R-674-D, containing approximately 845,000 cubic yards; Relief Levee Item R-674-H, containing approximately 940,000 cubic vards, and Relief Levee Item R-674-I, containing approximately 800,000 cubic yards, all situated in the Lower Tensas Levee District, in accordance with designated specifications and drawings made a part of the contract.

The contract recited that: "Drawing showing soil borings for Relief Leves Items R-674, C, D, H, and I, not furnished with specifications, were furnished to all prospective bidders by circular letter dated October 5, 1982, as per copy attached to Specifications No. 38.138 forming a part hereof."

The complaint in this smit is concerned only with Relief Leves Item Re-74-C, which extended from Station 3800+36 to Station 3870+00, and more specifically with the section 1500 to 1500 The work or lines Re-74-C was enlargement of an existing leves to the riverside thereof, and the material was to be procured from land to the riverside of an old borrow pit, that was itself riverward of the existing leves, so that the old borrow pit was between the projected enlargement and the

Paragraph 28 of the specifications provided among other things:

 excavation below the specified borrow pit slopes constitutes a violation of these specifications and shall be immediately refilled to the specified slope line plus 25 percent additional material for shrinkage.

\* \* No material shall be obtained within 40 feet of the base of the levee on the river side. \* \* . The side slope of the pir next to the embanisment shall not be steeper than 1 on 2 to a depth of 3 feet; from that point the outward slope of the pir shall not be steeper than 1 on 50 when on the river side of the levee. \* \* .

Paragraph 36 of the specifications provided that the riverided fashe berm should have a crown width of 46 feet, a crown slope away from the levee of 10 m 30, and a slide alope of 1 m 3. A false beer may as table extending from the too of the leves and placed by artificial mean, as distinguished from a natural bear whose surface was at natural ground from a natural bear whose surface was at natural ground weight of the leves embantment and in part to protect the leves embankment against evolu-

Article 5 of the contract provided that "no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order."

Copy of the contract, the specifications, and the drawings, including that showing soil borings, is filed in evidence and made part hereof by reference.

3. The work to be performed under the contract was sublet by the partnership to W. E. Callahan Construction Company with the approval of the United States. Compensation under the contract was paid to L. D. Crawford, attorney-in-fact for the partnership, and by him in turn paid over to W. E. Callahan Construction Co.

W. E. Callahan Construction Co. in turn sublet the work to Callahan-Walker Construction Co., which actually performed the work, and to which any amount recovered herein by the plaintiff will be paid over.

4. Those actually performing the work are referred to hereinafter as the "contractor."

The contractor used on the job a tower machine. This consisted of a head tower, placed on the landside slope of

the existing levee, a tail tower, placed at the point of excavation (the borrow pit), and intervening cables carrying a bucket which, when loaded at the tail tower, was dragged on the ground toward the head tower, and, when emptied on the embankment was returned on an overhead cable to

the tail tower, where it was again loaded. The capacity of the bucket was about a dozen cubic yards.

As to the section of leves here involved, Sections 3219 to 3252, the path taken by the blacket was across the old borrow pit. As it was dragged loaded toward the head tower some portion of its load would spill into the old borrow pit. The blockst was necessarily dragged over the surface again and again and in the process to a greater or less extent changed the contour thereof. There is no proof as to any diffinition amount of earth thus spilled by the blacks, but these diffinition amount of earth thus spilled by the blacks, but there definite amount of earth thus spilled by the blacks, but there clean the spilled by the blacks and the spilled by the blacks are been as the new borrow pit up to the same planes as the new borrow pit.

 While the work was in progress Callahan-Walker Construction Co. communicated with the contracting officer January 25, 1933, as follows:

We find that on the part of item (R 674 C) on which we are now working with our Tower Excavator, that due to our method of construction it is necessary for us to fill in between the false berm and the back of the existing pit in order to bring it up to the same plane as the new pit.

plane as the new pit.

It has been our policy so far to leave this material as placed so that it will serve as berm, and afford the pit with the place of the pla

some time in the near future.

Callahan-Walker Construction Co. followed this up with another letter to the contracting officer February 8, 1963.

as follows:

On January 25th when we were working at station
3205 we wrote you that we were filling the old existing
pits up to the plane of the new pits in order to give the
pit verfect drainage and make a neater looking job.

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We have continued this policy and placed approximately 25,000 cu. yds. in the old pits as we have proceeded with the work to station 3222 to date.

From station 2020 to station 2022 we have found very poor foundation for the leves and it has been necessary for us to keep our construction slopes down to less than 6 to 1 in order to prevent the foundation from puffing any possible of the station of the station of the station of the part of the way up on the slope of the del leves. From the looks of the material duy from the inspection dish and the borings we have taken, the foundation consists of a blue muchy hardrain larged with a very fine and to of a blue muchy hardrain larged with a very fine and to a super straight down to a depth of 20 feet or more in some places. Every indication is that this condition

will continue until we reach station 3251.

We have good material for the embankment and we

have dug a ditch along the back of the existing pits for drainage and subdrainage of the foundation, but it is our bonest opinion that this leves will not stand on this foundation if we discontinue filling the existing pits. In view of the conditions as outlined above we more than ever feel that we should receive some consideration for the filling of these pits as we stated in our letter of January 26th.

On March 24, 1933, the contracting officer made the following reply to Callahan-Walker Construction Co.:

Receipt of your letters dated January 25th and Fcb. 8th, 1983, in which you request payment for refilling existing borrow pits between approximate stations 3219 and 3251 on Item R674C Kempe Lake St. John Leves

is acknowledged.

In reply, you are advised that careful consideration
has been given to your request and close examination
has been made of the conditions surrounding the work.
After review of the cross section and design of this
work and visual examination of the construction opera-

tions, the following conditions are found:

(a) No evidence of foundation weakness or instability
of cross section has been offered or could be found to

indicate the desirability of any modification in design.

(b) Examination of completed levee, berm, and borrow pits shows that construction conditions are unusually good as a whole. The character of material available, and used in construction, is exceptionally good.

Opinion of the Court

(c) Existing borrow pits and levee base are now apparently well drained, but should heavy rains become impounded in the construction are and levee construction be carried on under the resulting conditions, trouble may be anticipated, as would be the case elsewhere. The use of sound construction methods coupled with good drainage may be expected to result in the construction of a satisfactory lovee, fulfilling the best

interest of all concerned.

You are, therefore, informed that the design of this leves is considered adequate and satisfactory and unless sufficient reason is found for a change in design, none will be made. Any pit refll, beyond that provided for in the construction of false bern, placed by yourselves for your own purposes, will not be paid for our purposes.

On March 29, 1933, Callahan-Walker Construction Co. asked the contracting officer to reconsider its claim and on April 22, 1933, submitted details, claiming \$11,000.4 for backfilling old borrow pit between Stations 3219 and 3252, \$2.422 cubic varids at 12 cards.

No further action was taken by the contracting officer and or August 9, 1933, the partnership of Erickson & Hardwick, by L. D. Crawford, attorney-in-fact, submitted an identical claim to the Chief of Engineers, U. S. Army. This claim was eventually presented to the Comptroller General of the United States, who, on August 29, 1934, finally denied it in a written opinion which is reported 14 Comp. Gen. 141.

in a written opinion which is reported 14 Comp. Gen. 141.

6. The contracting officer did not at any time order the contractor to place any fill in the old borrow pits.

The foundation under the levee as enlarged was possibly not uniform as to strength, but there is no satisfactory proof that if the old borrow pits had not been refilled by the contractor there would have been a subsidence of the newly enlarged levee, and the plaintiff has failed to show by a preponderance of the evidence that the extra work was necessary to the completion of the project.

The court decided that the plaintiff was not entitled to recover.

Green, Judge, delivered the opinion of the court: The plaintiff is administratrix of the estate of Walter

The plaintiff is administratrix of the estate of Walter S. Hardwick, who died intestate January 14, 1936. The decedent, during the contract period here involved, was a member of the partnership of Erickson & Hardwick, which was composed of the decedent and Carl Erickson. Subsequent to the contract period Carl Erickson died and the partnership was dissolved, Walter S. Hardwick surviving.

On November 17, 1982, Erickson & Hardwelic entered into a contract with the defination to perform certain work required for the construction of a leves. Work to be performed under the contract was subset by the partnership to formed index the contract was subset by the partnership to extract the contract was paid to the W. E. Callahan Construction Co. who in turn sublet the work to the Callahan-Walker Construction Company which scalally performed the work and to which if any amount is recovered herein by the plaintiff will be paid. Those actually performed her work are hereinafter paid. These actually performed herein when the reduction of the paid.

The contractor performed the work specified in the conract and was paid for it in accordance therewith. It also did other work not provided for either in the contract or the specifications for which it has demanded payment. This demand being refused, it now brings suit to recover the ressented in that the extra work was not ordered by the contracting officer nor was it necessary to the completion of the project.

Article 5 of the contract provided that "no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order."

The findings show not only that the work was not ordered by the contracting officer but that plaintiff was informed

that if done it would not be paid for. See Finding 6. While we have held that when changes are ordered by the contracting officer in the manner provided by the contracting officer in the manner provided by the contract, and the work is necessary for the completion of the project and is received and accepted by the Government, that an implied contract arises to pay the reasonable value of the work; it has also been held that where the contract provides that no nawment should be made for any extra

#### Syllabna

work or material unless it is ordered in the manner preerribed by the contract, that this clause is fatal to any recovery by the contractor for the work not so ordered. See Plumley v. United States, 43 C. Cls. 266, 280, 281; Plumley v. United States, 280 U. S. 485, 271; Hyde v. United States, 38 C. Cls. 498, 688, 689; Morgan v. United States, 59 C. Cls. 600, 654.

The failure to comply with this provision is sufficient without anything else to prevent recovery in the case but another matter should be noticed.

The Commissioner of this court made a finding which in substance was to the effect that the work was not necessary for the completion of the project. Plaintiff attenuously objects to this finding but upon examination of the evidence, we think it is substantially correct and, changing the worling nightly, we have found that plaintiff has failed to show any to the completion of the project. This also would prevent a recovery in the case.

The plaintiff's petition must be dismissed and it is so ordered.

Madden, Judge; Jones, Judge; and Whaley, Chief Justice, concur. Whitare, Judge, took no part in the decision of this case.

BRAEBURN ALLOY STEEL CORPORATION v. THE UNITED STATES

[No. 43494. Decided January 5, 1942)

#### On the Proofs

compensation under FVIII. Amendment to the Contribution; one represent damage at Attenderabled from a fasting—When an office building and its contents, belonging to plantelff, were destroyed as a result of the food in the Atlegory Birrer in 1500; and where the addressed dam exceeds on said river in 1500; and where the addressed dam exceeds on said river in 1507 by declarating and the protective disc exceeds abortly and the said of the contribution of the said of the contribution of address property, including the property of plaintiff, against any flood that had ever been known in that area; it is hold that the construction of said dam in 1927 and other acts connected therewith did not constitute a taking of maintiff's property by the Government within the meaning of the Fifth Amendment to the Constitution and that whatever damage was caused to plaintiff's property at the time of said flood by reason of the presence of the dam in the river was consequential in its nature, for which the Government cannot be required to remond in damages.

Some.-There is a marked distinction between a taking for public use, for which just compensation must be paid, and mere resolting damage. Bedford v. United States, 192 U. S. 217: Marret, Administrator, et al. v. United States, 82 C. Cls. 1: Some.-Where, in the making of improvements by the Government

299 H. S. 545 cited.

within the legal limits of a navigable stream there is some incidental or consequential damage resulting to the owner of private property, there is no taking of such property by the Government and hence no liability. Sanowinetti v. United States, 264 U. S. 146; Danforth v. United States, 308 U. S. 271; Marret, Admr. et al. v. United States, 82 C. Cls. 1: 209 U. S. 545 cited. Same; Government not an insurer .- The Government is not an in-

surer of riporion owners against damages resulting from floods. Same : cases distinguished ... United States v. Lungh 188 H. S. 445. and United States v. Cress, 243 U. S. 316, representing the greatest lengths to which courts have gone in permitting recovery in cases similar to the instant suit, are distinguished.

The Reporter's statement of the case:

Mr. Herman J. Galloway for the plaintiff. King & King

were on the briefs. Mr. Percy M. Cox. with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant,

The court made special findings of fact as follows:

1. Plaintiff is and at all times pertinent hereto was a Pennsylvania corporation with its principal place of business at Braeburn, Pennsylvania,

2. For many years prior to and including 1936, plaintiff had a plant located on the east side, or left bank, of the Allegheny River in Pennsylvania, about thirty miles north of Pittsburgh and adjacent to the village of Braeburn. It is still at the same place. The plant was designed for use in the manufacture of high-grade tool steel and other steel of a special character and has continued to be used for that purpose. The original buildings were constructed about 1898 and additions have been made thereto from time to time since that date.

The plant consisted of various structures of the usual type in a business of that character, including the steel mill, storehouses, and other buildings. One of the buildings was an office building of brick construction, the older part of which was built in 1904 and an addition thereto in 1916. The office building contained the ordinary office equipment, files, and supplies for a business of that character, and plaintiff's metallurgical and chemical laboratories were located therein. It also contained the furniture, fixtures, and equipment for a dining room and a kitchen to supply food to the officials and employees of the plaintiff.

Plaintiff's land on which the plant was located extended for a distance of approximately 2,000 feet from a point slightly below the location of what is known as Dam No. 4, up the river and adjacent to the pool formed by that dam. The strip of land on which the plant was located was situated between the Alleghenv River and hills of considerable elevation along the river. The soil on which the plant was located and in the area at and near Dam No. 4 was of an alluvial character, subject to erosion, and consisted of sand, gravel, silt, and similar material which had been deposited by water between the river bank and the hills. The distance from Dam No. 4 to the hills opposite thereto was approximately 800 feet-The tracks of a line of the Pennsylvania Railroad were located between plaintiff's plant and the hills. The elevation of the railroad at the point where the dike, hereinafter referred to, tied into the railroad track was 765.5 feet above sea level and varied from that elevation to approximately 760 feet at or near the lower end of plaintiff's plant. The eleva-

tion of the ground on which plaintiff's plant was constructed varied from approximately 755 feet at one low point at the office building to approximately 762. The average elevation at the office building was 758. 3. In September 1927, the defendant, for purposes of navigation, completed a lock and dam known as Dam No. 4 which

extended across the Allegheny River from Braeburn on the

Reporter's Statement of the Case east hank to Natrona on the west. The dam consisted of a concrete structure located on bed rock. On the east side, the dam was tied into a concrete abutment which was likewise located on bed rock at an elevation of 702 feet. The abutment, approximately 100 feet in length, was constructed parallel to the bank of the river and had a wing on each end which extended into the bank (soil) approximately 25 feet. The abutment was located approximately 150 feet in a southwesterly direction from plaintiff's office building heretofore referred to. The pool level immediately below the dam was at an elevation of 734.5 feet and the pool level of the dam was at an elevation of 745 feet. The ordinary high water mark at the dam was 747 feet. The top elevation of the abutment was 757 feet, which was approximately two feet higher than the top elevation of the bank of the river at that point. The dam and abutment, including the dike referred to, were constructed in such form and manner that they had withstood all flood waters experienced since their construction. Such construction was of a character reasonably adequate to withstand any flood waters of the type theretofore experienced or recorded at that point.

The dam raised the pool level of the river approximately 10.5 feet, which resulted in raising the water table of the land in that area, including plaintiff's land adjacent to the pool of the dam. This raising of the water table adjacent to plaintiff's land made the land which was of an alluvial nature more unstable because of the water which penetrated therein, increased the pressure thereon, and therefore made it more subject to erosion.

In the original plan for the construction of the dam, no provision was made for the construction of the dike extending from the dam upstream between plaintiff's property and the river, but at or about the time of the completion of the dam, when high waters indicated an immediate need therefor to prevent the water from overflowing on plaintiff's property and other properties, a dike was constructed which extended from the dam upstream a distance of approximately 2,500 feet where it was tied into the fill of the tracks of the Pennsylvania Railroad. For approximately 2,000 feet of that distance it was adjacent to plaintiff's property and between

Reporter's Statement of the Case

its property and the river, and for that distance it was constructed on land belonging to plaintiff. When it was decided to build the dike, defendant instituted condemnation proceedings to acquire title to the necessary land. In view of the emergency, defendant almost immediately began construction of the dike without waiting for the completion of the condemnation proceedings, though title was ultimately acquired through such proceedings. The dike was built to an elevation of 766 feet which was approximately 11 feet higher than the general bank level of the river, and tied into the railroad at an elevation of 765.5 feet. It was constructed of sand and gravel obtained from the river bed.

4. On and shortly prior to March 17, 1936, heavy rains occurred in the watershed of the Allegheny River which together with the melting snows in that area caused the highest flood at plaintiff's plant ever recorded. The highest elevation previously reached by floodwaters at that point was in 1913 when an elevation of 761.75 was reached, whereas the flood here in question reached an elevation of 768.8. It was the most disastrous flood in the history of that area. The lower part of the city of Pittsburgh was inundated and serious damage was sustained by property owners along the Alleghenv River through the inundation and washing away of structures, erosion of land, and in other ways,

The abnormal rise of the river began on March 17, 1936, and by midnight, or shortly thereafter, the floodwater had overtopped the dike referred to in finding 3. With the overtopping of the dike, the water flowed into and around plaintiff's plant. However, prior to the overtopping of the dike. boils and bubbles appeared at various places in the dike where water came through, though no break or crevasse of an appreciable size occurred in the dike until about the time it was overtopped. The flood overtopped the dike at all points and finally washed it away in many places. The dam, when the flood was at its height, resulted in raising the elevation of the river above the dam approximately five inches and impeded the velocity of the river at that time in only a slight degree. At the crest of the flood the water was approximately eight feet deep in plaintiff's mill buildings, and its office building was covered with water to within three feet of the eaves, that is, about thirteen feet from the ground elevation. The crest of the flood was reached on March 18, when the legan to reaced, and by the afternoon of March 19 it had recorded to the extent that both plaintiffs main plant and office building were substantially free from water.

5. When it was found that the floodwaters had recorded from its plant, plaintiff began making preparations to resume operations and notified its employees to report for work the following day (March 20) for the purpose of cleaning up debris; restoring the damaged portion of the plant, and doing other general retoration work. Included in the work to be done was the removal of debris from the office and equipment in that buildine.

However, late on the evening of March 19, erosion was observed along the bank of the river a short distance below the dam and defendant began preparations to combat it. Whether erosion was also taking place at the abutment at the time the erosion downstream was observed could not be determined since the floodwaters were overflowing the area between the abutment and plaintiff's office building. The dam, however, was contributing to the erosion below the dam in that it was causing in that area along the bank of the river an eddying or whirlpool condition which was cutting away the bank. Not until the late morning of March 20 did plaintiff's office building appear to be in danger. However, by about nine or ten o'clock on the morning of March 20, erosion became very evident around the end of the abutment, a channel approximately 20 feet in width having been cut between the abutment and plaintiff's office building. The erosion which had started as indicated above continued in a somewhat L-shaped manner, scouring and cutting into the bank opposite and below the abutment, The current in the channel around the abutment was swift with a whirlpool or eddy movement, which cut rapidly into the bank between the abutment and the office building.

In spite of heroic efforts on the part of defendant's representative to stop the erosion from the floodwaters, it con-

tinued and by about noon on March 20 it appeared that the erosion could not be stopped before it reached plaintiff's office building and that that building was doomed. By five p. m. on that day the channel had cut to within one foot of the building and about one hour later a corner of the building collapsed and slid into the river. The erosion continued, undermining and taking parts of the office building. On March 22 the erosion had taken away the greater part of the ground on which the office building stood and only a small part of the building was left standing. On that day defendant's representatives caused the remaining part of the building to be pushed into the stream for the purpose of assisting in arresting the erosion. The erosion, however, continued until March 28 when it was finally stopped after having cut away all of the ground on which the office building was located. The channel around the abutment was cut to a depth of approximately 50 feet.

6. When the erosion was first observed near Dam No. 4 on March 19 and 20, defendant proceeded promptly with steps not only to arrest the erosion but also to protect the property in that immediate area. Large quantities of material of various kinds, including stone, box cars, and sand bags were used and the erosion was finally arrested by about March 28. Defendant expended approximately \$350,000,00 in this protective and arresting work.

Thereafter defendant not only restored plaintiff's and other land similarly affected to approximately its condition prior to the flood, but also improved and restored the abutment and dike. The primary purpose of the restoration work was to protect the abutment and dam. The dike was reconstructed from the abutment upstream and it was also extended downstream from the abutment to a point where it ioined a road below the dam. A weir was then constructed by driving sheet steel piling in a line with the dam across the gap formed by the washout between the abutment and the railroad, a distance of approximately 350 feet. The space between the piling and the existing bank upstream was filled with sand and gravel to an elevation of 758 feet. Below the piling, sand and gravel were placed to form a slope of ap-449973-42-CC-vol. 95-24

proximately one no two and the unifice of this fill was protected by heavy derrick stone. In addition inprapping protected by heavy derrick stone. In addition inprapping 200 feet upterson from the abstract, and all of the fill downstream from the abstract, and all of the fill downstream from the abstract was rigrapped. The dam and abstract were unharmed by the food, but in the restoration work the lower part of the abstract raining wall extending downstream from the dam was raised from elevation 787 to devote 187, the height of the abstract alphanet to the contract of the contract of

7. When it appeared that the office building would be destroyed, plaintiff made every reasonable effort to save its contents, but salvaged only four desks, three typewriters, an adding machine and a small safe containing sooms accounting records. With the exception of the safe, these articles were of little or no value thereafter.

Only a short time elapsed between the discovery that the building would be destroyed and its actual collapse. During a portion of this time it was unsafe for workmen to enter the building, even if access thereto had not been made difficult by the presence of debris obstructing the entrances. It was because of these circumstances that so little of the contents of the building was perceived.

On March 17, 1806, the fair market value of the office building, including the concrete steps, sweep, plumbing, heating, and lighting equipment and fixtures, plus the fair market value on the same date of the furniture, office fixtures and equipment, supplies, laboratory equipment, and kitchen and dining room equipment in the office building, exclusive of the equipment removed during the flood, was \$40,000.00.

or the equipment removed during the flood, was \$40,000.00.

What damage was sustained to the office building and its contents by the flood prior to the time the building collapsed does not satisfactorily appear from the record.

 April 23, 1936, plaintiff filed with the War Department a claim for damages which included, among other items, a claim for loss of the office building and its contents referred to above. The War Department disallowed the claim September 16, 1936.

# Quinion of the Court

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The court decided that the plaintiff was not entitled to recover.

Jones, Judge, delivered the opinion of the court:

Plaintiff seeks to recover the value of a building and its contents at the time of their destruction during the flooding of the Aligheny River in 1906. In order to bring itself within the property of the content of the recovery of the content is liable for the damages in question for the reason that through the construction of a dam in 1927 and other state connected therewith the defination created a condition as a result of which the floodwaters destroyed its building, and meaning of the Piffth Amendment to the Constitution.

For many years prior to and including the year 1896 plain:
if owned and operated a steel mill located on the east side,
or left bank, of the Allegheny River in Pennsylvania. In 1927 the defendant constructed a foun across the Allegheny
River near the lower end of plaintiff's hand. Plaintiff's plant
are in that location at the time and had been there for some
25 or 30 years prior thereto. The hand on which the plant
of the plaintiff's plant on the plant of the plant of

The dam was built to a crest elevation of 745 feet above mean sea level, which was 2 feet below the ordinary highwater mark at that point. The dam was tied into a concrete abutment 100 feet in length which was provided with wing walls extending 25 feet into the river bank. A few months after the completion of the dam, when it appeared that the floodwaters might damage the property of adjacent owners, including plaintiff, defendant constructed a dike 11 feet in height along the river bank, thus bringing the top of the dike to an elevation of 766 feet. This dike extended from the dam approximately 2,500 feet upstream where it was tied into a railroad at an elevation of 765,5 feet. Plaintiff's plant was located between the dike and hills of considerable elevation to the east thereof. The railroad tracks which had an elevation at the upper end of 765.5 feet were between plaintiff's plant and the hills. The elevation of plaintiff's property varied from a low point of 755 to a high point of 762 feet. On March 17, 1898, an unprecedented flood occurred which raised the waters of the Alleghomy River to an elevation of 768.8 feet, which was 7 feet higher than the highest previous flood and 28 feet higher than the top of the dike opposite plaintiff property. With the overtopping of the dike the floodwaters overflowed plaintiff is plant, such waters reaching a height of 8 feet in the steel mill and 13 feet in its office building, which was within 3 feet of the eaves. While coneidership damage resulted to its contents, the office building because the standing until 16 lister electroction as benefits the steel standing with 16 lister electroction.

The crest of the flood was reached on March 18, and by the afternoon of the following day it had receded to the extent that not only plaintiff's plant but also its office building was substantially free from water. As soon as the water began to recede, it was discovered that erosion was taking place along the bank of the river a short distance below the dam. At that time water was flowing around the end of the dam near plaintiff's office building. The dam was contributing to the erosion by causing an eddying or whirlpool condition in that area along the bank of the river, which was cutting away the bank. By the following morning the erosive action of the river had cut a channel around the end of the abutment between the abutment and plaintiff's office building. This erosive action continued for several days and, in spite of heroic efforts on the part of the defendant to arrest the erosion, it cut away the land underneath plaintiff's office building which for the most part fell into the river. One small corner of the building which remained was pushed into the floodwaters to assist in stopping the erosion. Not only

Thereafter defendant restored plaintiff's land to approximately intendifican prior to the flood, and also made major improvements to the abstracest and to the diffs. As a part diving index state pointing in a line with the dama scrow the gap formed by a walhout between the abstract and the rail-ond, a part of which was located on plaintiffy property, and filled the space between the piling and the existing bank upunkneed by the flood, and the continuation of t

was the building lost but almost the entire contents thereof.

On these facts, which we have set out in more detail in our findings, plaintiff seeks recovery.

At the outset is should be observed that the parties are agreed that the dam and abutment were constructed as an aid to navigation on a navigable stream where the Government and a right to build them and that no head taken in conneclept in mind that the dam and abutment were constructed lepst in mind that the dam and abutment were constructed below the level of the ordinary high-water mark, and that the power of the Government over navigation covers the entire deep of a navigable stream, including all lands below ordinary high-water mark. United States v. Oblogo, Mileonskee, St. the Survence Court March 28, 112, U. S. 808, decided by

to oppressive Color Annual of the property which was destroyed intring the flood of March 1808, on the ground that in effect there was a taking of its property because the presence of the dam in the river contributed to its destruction. It is well established that where private property is taken for public use just compensation must be paid to the owner of such property, but it is likewise true that there is a marked distinction between a taking and more resulting damage. Sedford v. Out of Science, 180 C. Cin. S. 217, Howers, California 1980 II. S. W. Thriefed Science, 180 C. Cin. 1, cuttored damined 1980 II. S. W. Thriefed Science, 180 C. Cin. 1, cuttored damined 1980 II. S. C. Thriefed Science, 180 C. Cin. 1, cuttored damined 1980 II. S. C. Thriefed Science, 180 C. Cin. 1, cuttored damined 1980 II. S. C. Thriefed Science, 180 C. Cin. 1, cuttored damined 1980 II. S. C. Thriefed Science, 180 C. Cin. 1, cuttored damined 1980 II. S. C. Thriefed Science, 180 C. Cin. 1, cuttored damined 1980 II. S. C. Thriefed Science, 180 C. Cin. 1, cuttored and 1800 C. Cin. 1, cuttored and 1

Where, in the making of improvements by the Government within the legal limits of a navigable stream, there is some incidental or consequential damage resulting to the owner of private property, there is no taking of such property by the Government and hence no liability. \*SimputnetM v. United States, 286 U. S. 148; Denforth v. United States, 286 U. S. 214; Marret, Administrator, et al. V. United States,

306 U. S. 271; Marret, Administrator, et al. v. United States, supro.

The Government is not an insurer of riparian owners against damages resulting from floods. The fact that it required the intervention of another and efficient cause, produced the intervention of another and efficient cause, support of the contract of the contract of the contract partial contract of the contract of the contract of the produced of the contract of the damages and it is well established that the Government is

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occurred.

Opinion of the Court not liable for damages of that character. Bedford v. United States, supra; Jackson v. United States, 231 U. S. 1; Sanquinetti v. United States, supra. L. J. House Connex Glass Co. v. United States, 81 C. Cls. 661, certiorari denied 296 U. S. 611. In the last-named case this court held that where a privately owned gas well adjacent to a pool created in a navigable river by a dam constructed by the Government for the improvement of navigation was not improved or its operation materially interfered with by the waters of the pool at normal pool level, its inundation and being rendered valueless by the occasional floodwaters of the river did not constitute a taking of private property for which compensation might be recovered from the Government.

An examination of the facts in this case on the basis of the principles and authorities set out above clearly reveals that there was no taking for which the Government must respond in damages, but that it is a case of consequential damages for which the Government is not liable. Plainly without the flood the damages complained of would not have occurred. In fact, in view of the protection afforded to plaintiff's property by the dike constructed by defendant between plaintiff's property and the river, it is even conjectural whether plaintiff suffered more or less loss due to the presence of the dam in the river with its attendant abutment and dike. Plaintiff's plant was located on ground which varied in elevation from 755 to 762 feet, whereas the dike in front of that property was to an elevation of 766 feet. The crest of the flood was at an elevation of 768.8. At its crest the height of the floodwaters was raised by the dam only about six inches. Until the dike was overtopped, substantial protection was afforded to plaintiff's plant and even after the overtopping it is only reasonable to assume that some further protection was afforded in breaking the force of the waters as they flowed into plaintiff's plant, thereby decreasing the damage which might otherwise have

The measure of damages which plaintiff would have us apply illustrates the difficulties which would be encountered in determining the damage attributable to defendant, if the defendant could be held liable. The damages sought are

# (S) Opinion of the Court

the value of the offee building and its equipment at the time of the floot, without taking into consideration that substantial damage had already occurred directly from the flood prior to the time the building was undermined from erosion and destroyed. Prior to the time of its total detruction, the building had been subsurged in waters from the flood almost to its caves and not only had its contents been severely damaged, but some damage had also been done to the building itself. Certainly the damage done the building and its contents prior to the time it fell into the result of the content of the time it fell into the prior was also the content of the time it fell into the strictlend caused by the floot almost and on in me very betarticized, or which detectable had does at that point on the river.

In an effort to bring itself within the various decisions allowing compensation for the taking of property, plaintiff sets out instances where it save there were invasions of its property by the Government and therefore a taking. In the first place, it says that the dam and dike were inadequate and were not properly constructed, which acts of omission or negligence caused an invasion, destruction, or taking of plaintiff's property. The first answer to this is that the record shows the dam, shutment, and dike were constructed in accordance with good engineering practice and that they not only had withstood other high floods but would reasonably have withstood any flood of the character previously experienced on this river. The destruction in question came with an abnormal flood which raised the water some seven feet higher than any previous flood. But even if it could be said that there was something in the nature of negligence in this construction work, this would not aid plaintiff for the reason that an action thereon would sound in tort, of which this court does not have jurisdiction. Mills et al, v. United States, 46 Fed. 738, and Bigby v. United States, 188

U. S. 400.

Plaintiff's further suggestion that some basis for this cause of action exists because defendant sent its men and equipment onto plaintiff's land in order to try to stop the erosion which eventually resulted in the destruction of plaintiff's property, can not be taken seriously. In his testimony plaintiff's president had this to say of those efforts:

"Wall, I certainly would be very unappreciative if I did not give acritis to be Engineer's Office and Major Styre and those that were interested in the very upparent effort that they made by aligning in technical Coroli. and some present of the control of the coroline of the coroline of the refer to I am glad to give credit for that." With respect to the restoration work after the flood, not only was plaintiff ground restored, but also substantial protestive work was carried out. Whether the protester work, including the ware, nonreached upon and used any of plaintiff is had for which compensation should be allowed is not an issue

Opinion of the Court

The two cases on which plaintiff places main reliance as showing an actionable taking of the property similar to that involved in the instant case are United State v. Lynch. These cases have been referred to on more than one occasion as representing the greatest lengths to which courts have gone in permitting recovery in case of this kind. (Transportation Company v. Chicago, 90 U. S. 685; Franklin et al., 50 Cm 200; J. 10 D. 10

In addition those cases are easily distinguishable on their facts from the case at bar. In the Lynok case there was a permanent flooding of the property; in the Oress case the flooding, though intermittent, was regular and frequent. In both cases these continuing conditions naturally followed from the construction of the dam, and were the foreseable results of its construction.

results or us coastruction.

This is far different from the circumstances of an unprecedented and unforesseable flood where, as in the instant case, the dam and protective dike were adequate to fully protect the adjacent property against any flood that had ever been known in that area. In the latter case essential elements of an actionable taking are necessarily absent.

Syllabus

In view of the foregoing we find that the acts complained of by plaintif did not constitute a taking of its property by the Government within the meaning of the Fifth Amendment to the Constitution, and that whatever damage was caused to plaintiff's property by reason of the presence of the dam in the river was consequential in its nature, for which the Government can not be required to respond in

It follows that the petition should be dismissed, and it is so ordered.

Madden, Judge; Littleton, Judge; and Whalex, Chief Justice, concur.

Whither, Judge, took no part in the decision of this case.

## INTERNATIONAL-STACEY CORPORATION v. THE UNITED STATES

[No. 44276. Decided January 5, 1942]
On the Proofs

Patent for radio autenos system; collidity; infringement—On the facts disclosed by the evidence adduced, pertisent to the opention of validity and infringement of patent #2,008,081, to Charles E. Schuler, at issue in the instant case; it is half that claim 4 of satil patent is invalid under the prior art; that claims 5 and 7 as specifically limited are not applicable to the alleged infringing artrature, and that it said claims

to the alleged intringing structure, and that it is said claims were no interpreted as to discregart the aspectic limitation contained therein they, also, would be invalid in view of the prior knowledge and uses and plaintiff is accordingly continued to recover.

Same; prior art and use.—Prior to any effective dates of the Schuler

invention, patent #2,006,031, in suit, those skilled in the art had knowledge:

(a) That both the conductivity and dielectric constant of the

enth affected the distribution of current adjacent the antenna, and that a loss of energy was likely to occur by the penetration of the lines of force through the earth to a buried ground system.

(b) That a variation in the pattern of the radiated waves from the antenna would be caused by variations of conducReporter's Statement of the Case tivity in various portions of the ground under or adjacent to the base of the antenna.

(c) That a metallic ground acreem located under the anenan, elevated above the surface of the ground, and grounded at various points in its periphery, would function to reduce the effects set forth in items (a) and (b) and would therefore return or reflect energy to the antenna which would otherwise or return or reflect energy to the antenna which would otherwise or

Same.—The beneficial affect of ground screens located at the base of the antenna was well known to those skilled in the art, and to utilize such a ground screen in connection with a gyramidal tower auteums such as is disclosed in the prior art would not be produce any novel or unforcesser result and would not involve invention, and claim 4 in issue is accordingly invalid.

Some.—If claims 5 and 7 are so interpreted as to disregard the specific limitation contained therein as to the ground conor metallic plate member being located on the "ends of file seasilators," these claims will be timulitated in view of the prior knowledge and use of ground screens located at the bases of the antenna.

Some.—The proof shows that the radio antenna ground acreen claimed in the patent in suit is the same, or substantially the same, as ground screens previously described and used, and that it performs the same function in the same way to obtain the same results.

Same.—That which would infringe if later will anticipate if earlier.

Same.—The plaintiff cannot assert a broad construction of its claims
in order to make out a case of infringement and then narrow
its claims as as to avoid anticipation.

The Reporter's statement of the case:

Mr. Samuel Scrivener, Jr., for the plaintiff. Mr. William S. McDowell and Mr. Albert R. Grobstein were on the brief. Mr. Poast P. Stoutenburgh and Mr. Walter J. Ellenko, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant. Mr. T. Henycard Broom was on the brief.

Plaintiff brings this suit to recover \$85,000 as compensation for the alleged unauthorized use by the defendant of a patent directed to a radio antenna system for the generation and propagation of electromagnetic waves for radio transmission.

The defendant insists that the patent claims in suit are invalid under prior patents, publications, and uses. Reporter's Statement of the Case

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. This suit alleges infringement of United States patent to Charles E. Schuler 2,008,931, issued July 23, 1935, on an

application filed April 30, 1934.

The patent in suit is directed to a radio antenna system for the generation and propagation of electromagnetic waves

for radio transmission. 2. The plaintiff, an Ohio corporation, was organized April

21, 1931, and on the date of filing the petition herein was in good standing as a corporation of that State. It has a place of business at 875 Michigan Avenue, Columbus, Ohio, The plaintiff is a manufacturing corporation.

3. The application which materialized into the patent in suit was filed in the United States Patent Office on April 30. 1984, the oath of this application being executed on April 23, 1934

A certified copy of the file wrapper and contents of the application (plaintiff's Exhibit 7) is by reference made a part of this finding.

4. The patent in suit, a copy of which (plaintiff's Exhibit 1) is by reference made a part of this finding, was issued to

the plaintiff corporation on July 23, 1935, the same having been assigned to plaintiff by Charles E. Schuler in an assignment executed April 23, 1934, which assignment was duly recorded in the United States Patent Office. A certified

copy of the same (plaintiff's Exhibit 6) is by reference made a part of this finding. Plaintiff corporation ever since the assuance of the patent

has been the sole and exclusive owner of the entire right, title and interest therein.

5. The subject-matter of the present case relates to radio transmitting systems and involves certain basic principles involved in antenna construction.

There is diagrammatically illustrated herewith a simple vertical antenna comprising a wire or vertical conductor. this illustration being reproduced from paragraph 22 of the prior art publication "Radio Telephony for Amateurs"

(Finding 27). As used for transmission, the antenna is suitably insulated from the earth and energized by a source Reporter's Statement of the Case
of high-frequency energy, one terminal of this source being
connected to the antenna and the other terminal connected
to the earth.

The antenna has an electrical capacity effect with respect to the earth similar to that existing in an electrical condenser, the antenna comprising one plate thereof and the earth comprising the other plate of the condenser.

In a condenser it is fundamental that the capacity effect is greatest and the electrostatic field is a maximum where the distance between the plates is a minimum.

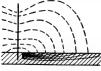


Fig. 51.—Showing flow of currents in the earth in a typical case of direct grounding (Zenneck).

In the simple antenna diagrammatically shown, the capacity effect is therefore the greatest at the base thereof, where portions of the antenna are nearest the earth, the capacity effect at any point in the vertical antenna diminishing from the base thereof to the top.

When the antenna is energized from the high-frequency source, lines of electrical force, shown in the illustration as dotted lines, develop between the antenna and the earth, these lines of force being most intense and concentrated at the porReporter's Statement of the Case
tion of the antenna nearest the earth, or at the base of the
antenna, and diminishing in intensity and concentration at
points remote from the base of the antenna. These lines of
force cause currents to flow in the earth as shown in the illustration in solid lines, which converge adjacent the lower end
of the antenna, the current density being greatest at this

point.

6. The earth is usually a relatively poor conductor and
possesses electrical resistance, and the current flowing back
to the antenna through the earth is partially dissipated as
the the continuous cont

condition of the ground, whether the ground is wet or dry.

In order to descrees the less of the current flowing in the
earth, and in an attempt to obtain constant autorus chargetop the control of the control of the control of the control
top review as metallic ground or network which will provide
a substantially low resistance surface, having constant electrical properties and through which the ground currents may
return to the generator. The conventional form of ground
tills wires realizing outward symmetrically, like the spokes
of a wheel, from the base of the automate to a distance of a
proximately one half of the emitted wave length, and purie
a short distance below the surface of the ground. In a
typical broadcasting station those wires are about 450 feet
typical broadcasting station those wires are about 450 feet

Where the earth has a very high resistance the wires of the ground system are supported above the surface of the earth and are either insulated from the earth or each wire is connected to the earth at its extremity. Such systems are known in the art as counterpoises and are the functional equivalent of the buring areas of surface.

of the buried ground system.

Reconomic factors may influence the extent and character

Economic factors may influen of the ground system employed.

of the ground system employed.

7. About 1890 the so-called vertical, self-supporting radiating tower antenna came into use. This structure consists of a metallic tower structure having a polygonal cross-section supported on less, insulating means being intercosed between

each leg and the earth. Instead of the tower acting merely as a support for an antenna, the structural members of the tower are connected to the source of high frequency and the entire tower functions as the antenna.

The relatively large horizontal cross-sectional area of such tower antennas and particularly of the base thereof causes a more intense electrical field to exist between the lower part of the antenna and the earth than in the case of a vertically supported wire antenna of relatively small horizontal cross section.

#### THE PATENT IN SUIT

 As stated in the patent in suit, the disclosure thereof relates to—

\* \* the art of radio broadcasting and transmission of electromagnetic waves through space by means of a radio tower or vertical antenna radiator; and more specifically to a novel high vertical radiator or antenna comprising a self-supporting tower structure insulated from a base and separated therefrom by a grounded condenser: \* \*

The patent specification, after making reference to certain prior art constructions to avoid radiation ground losses,

The present invention is not to be confined with these priors proposals, although one of the achiever objects of the present invention in the reduction of objects finded as vertical radiator that is substantially aff-supporting without the use of guy wires; a vertical proposal proposal proposal proposal proposal proposal supporting without the use of guy wires; a vertical feet trends of the height wave integrity and the profectiveness of the height wave inputs native accounficient of the proposal proposal proposal proposal proposite appearatus that is simple in construction, takes posite appearatus that is simple in construction, takes posite appearatus that is simple in construction, takes posite appearatus that is simple in construction, takes confloative ground series which further caregory to the redstitute or of the proposal protein the proposal proposal

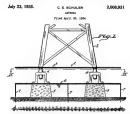
The preferred embodiment illustrated in the drawings of the patent in suit, Fig. 1 of which is reproduced herewith, comprises a rectangular tower formed of structural 27

Reporter's Statement of the Case steel members and girders, having a relatively broad base

tapering to a narrow top.

As shown in the drawing, Fig. 1, the tower structure 1 is supported on a plurality of insulators 4 which are in turn

is supported on a plurality of insulators 4 which are in turn carried or supported on foundation piers 5. In the preferred embodiment of a metal framework 2 carrying a plurality of soldered intersecting copper wires 3 forms a screen or shield which is electrically connected to the bottom of the tower.



A second shield or screen 6, which is likewise formed of intersecting wires, is stated to be "carried or supported on the foundation piers," this second screen being connected at a multiplicity of points along its boundary or edges by leads 7 to a conventional buried ground system which, as stated, 7 to a conventional buried ground system which, as the state 2 and 6 have interproped between them the insulators 4, the specification stating that this combination functions as a trueplate condense between the tower proper and the groundate proplet condense between the tower proper and the groundate.

Reporter's Statement of the Case
With particular reference to the lower screen or ground

With particular reference to the lower screen or ground screen the specification states as follows:

By the present invention, however, the ground serven provides a highly conductive path upon which the electrostatic lines of force from the lower part of the tower terminate, and this screen being placed slightly above the surface of the ground, shields and prevents the intense electric field from existing at the surface of the ground.

Although the patent drawing discloses that the frameworks or screens 2 and 6 are coextensive, and have dimensions substantially double the spacing of the tower legs, there is no limitation or instruction given in the specification to those skilled in the art as to the size or area of the screens to be used.

The only statement contained in the specification with respect to the location of screen 6 is that it is to be "placed slightly above the surface of the ground." The specific embodiment disclosed in the drawings shows the ground screen 6 located at the bottom end of the insulators.

The specification further indicates that the elements or screens 2 and 6 may be made preferably in screen form with soldered intersecting wires of high conductivity, but both frameworks may be of solid conducting material if desired. 9. The claims in suit are as follows:

4. A wave antenna tower comprising a plurality of upright members interconnected by rigid structural members, said tower being of pyramidal form with the property of the property of the property of the insulators, and means below said insulators for reflecting energy normally lost, and returning it to the tower.

5. In a radiating tower antenna, a base support, insulators mounted on said support, and a condenser formed by metallic members on the opposite ends of said insulators comprising a grounded electrically conducting metallic plate disposed on the ends of the insulators closer to the ground and a metallic tower structure disposed above said insulators.

7. In a radiating tower antenna, a base support insulators mounted on said support, and a condenser formed by metallic members on the opposite ends of said insulators comprising a grounded electrically conducting

Reporter's Statement of the Case metallic plate member disposed in a plane substantially perpendicular to the axis of said tower on the ends of the insulators closer to the ground and a metallic tower structure disposed above said insulators.

10. While certain other claims of the patent not in issue, such as claim 3, contain phraseology directed to the pair of screens, the claims in suit are not so limited and do not in-

clude as an element the upper screen. 11. There is no evidence of conception or reduction to practice prior to April 30, 1934, the filing date of the application, of any of the subject-matter of the claims in issue.

 In the latter part of July 1935, and in August 1937. the plaintiff, through its employee Schuler, at conferences with Mr. A. W. E. Jackson, Chief of the Radio Development Section of the Bureau of Air Commerce, and other officials of the Bureau of Air Commerce, gave oral notice of the existence of the patent now in suit.

There is no satisfactory evidence of any written notice. The plaintiff, through the International Derrick and Equipment Company, its wholly-owned subsidiary, has sold and erected ground screens in connection with self-supporting antenna towers. There is no evidence that any of the equipment thus sold or erected has had any patent markings thereon

### THE ALLEGED INFRINGING STRUCTURE

13. The structures alleged to be infringements of the Schuler patent were purchased by the United States from the Blaw-Knox Company under contract #CC-2646 dated August 26, 1937, for 400 radio antenna towers, complete with sub-base insulators, radiator, counterpoise, etc., the specifications and drawings for which are included in the contract. The specification includes the following paragraphs:

#### 1. General description:

This specification describes a self-supporting insulated antenna tower to be used by the Bureau of Air Commerce. To insure a uniform electrostatic capacity for each tower regardless of varying heights of snow or vegetation in the vicinity of the tower, a counterpoise to be supplied on this specification will be located around each tower. . . .

449978-42-CC-vol. 95---25

# Reporter's Statement of the Case

2. Type of construction and dimensions:

The tower proper is to be supported on a steel base approximately eight feet high which will rest on the concrete footing. In order to reduce the capacity between tower and sub-base as much as possible, no horizontal member shall be used at the bottom of the tower or the top of the sub-base. However, horizontal members shall be provided approximately two feet below the top of the sub-base on all four sides to support the counterpoise framework. Supplemental diagonal bracing may be used if desired.

#### 9. Tower insulation:

Towers shall be insulated at the base with wet plastic process porcelain insulators which shall be designed so that they will adequately stand up under all stresses which will take place under the maximum loads specified. Porcelain insulators shall be given a high glaze to further assist in making them nonhygroscopic and to minimize the collection of dirt on the insulator surface. Insulators using inflammable materials, such as oil or phenolic compounds, shall not be used.

# 18 Compressors:

With each tower the manufacturer shall provide a counterpoise complete as shown in Drawing No. 1382A. revised 7/1/37, to be made of standard structural steel angles shipped completely knocked-down for bolting together in the field. \* \* The counterpoise is to be designed for attaching to the horizontal members which are provided two feet below the top of the tower sub-bases. The mesh for the counterpoise is to be supplied in lengths of 52 feet. It will be noted that the clamps shown for holding the mesh to the framework are of 1/4" material. Thinner material may be used provided the equivalent stiffness is obtained through some modification in the designs shown. \* \* \*

#### A copy of this contract, including the drawings (plaintiff's Exhibit 2), is by reference made a part of this finding.

14. At least one of the structures purchased by the United States under contract #CC-2646 (plaintiff's Exhibit 2) was manufactured for the United States by the Blaw-Knox Company and used by the United States subsequent to April 4. 1938, and prior to November 22, 1938, the filing date of the petition in this case. This structure is illustrated in





Reporter's Statement of the Case

plaintiff's Exhibits 19 to 21, inclusive, which are by reference made a part of this finding, plaintiff's Exhibit 20 being reproduced herewith for the purpose of illustration. The antenna comprises a vertical metallic tower, pyramidal

in shape and of approximately square cross-section, mounted on a concrete base extending two feet above the ground emrface

An insulator is interposed at each of the corner legs of the tower and a center strain insulator is provided, all of which insulators function to insulate the radiating portion of the tower from the earth. These insulators are located in a plane eight feet above the concrete base of the tower, and ten feet above the ground.

A conventional buried ground system comprising wires extending radially in all directions from the tower is associated with each tower and is connected to the grounded side of the exciting means for the tower.

A metal framework supports a horizontal reticulated metal netting or screen, which is positioned approximately two feet below the insulators and eight above the surface of the ground. This screen is approximately fifty feet square, the length of each side thereof being approximately eight times the length of each side of the base of the tower, the spacing of the tower less being six feet. This screen is grounded by being electrically connected to the buried ground system at the center and at the periphery of the

ecreen 15. The ground screen as used in the Government structures possesses the dual function of providing a uniform electrostatic capacity for each tower, regardless of varying heights of snow or vegetation in the vicinity of the tower, and for reflecting energy which would be normally lost in the absence of such screens, and returning it to the tower. 16. The terminology of claim 4 of the patent in suit is ap-

plicable to the Government structure.

17. Claims 5 and 7 of the patent in suit contain phraseology specifying a definite relationship or location of the screen with reference to the insulators. These claims are in accord with the illustrated embodiment of the invention

as shown in the drawings of the patent in suit, in which

the ground screen is mounted against the brackets at the lower end of the insulators. For convenience, these claims are herewith repeated, with the limiting phraseology italicized:

6. In a radiating tower antenna, a base support, insulators mounted on said support, and a condenser formed by metallic members on the opposite ends of said insulators comprising a grounded electrically conducting metallic plate dispused on the ends of the insulators closer to the ground and a metallic tower structure disposed above said insulators.

7. In a radiating tower antanna, a base support, insulators mounted on said support, and a condenser formed lators mounted on said support, and a condenser formed by metallic members on the opposite ends of said insulators comprising a grounded electrically conducting metallic plate member disposed in a plane substantially perpendicular to the axis of said tower on the ends of the insulators closer to the ground and a metallic tower structure disposed above said insulators.

18. The phraseology of claims 5 and 7 is not applicable to the Government structure in which the screen is located two feet below the insulators.

#### PRIOR PATENTS AND PUBLICATIONS

19. The prior art cited by the Patent Office during the prosecution of the application which matured into the patent in suit is as follows:

U. S. Patent No. 767,974, issued August 16, 1904, to John Stone Stone, plaintiff's Exhibit 7-A;

U. S. Patent No. 1,647,283, issued November 1, 1927, to Abraham Esau, plaintiff's Exhibit 7-E; U. S. Patent No. 1,694,135, issued December 4, 1928,

to Alexander Meissner, plaintiff's Exhibit 7-F; U. S. Patent No. 1,747,027, issued February 11, 1980, to Ernest Y. Robinson, plaintiff's Exhibit 7-D;

U. S. Patent No. 1,752,864, issued April 1, 1990, to Laurens A. Taylor, plaintiff's Exhibit 7-C;

U. S. Patent No. 1,783,072, issued November 25, 1980, to Henri Chireix, plaintiff's Exhibit 7–G;
U. S. Patent No. 1,839,426, issued January 5, 1982, to Graf G. von Arco et al., plaintiff's Exhibit 7–B;

U. S. Patent No. 1,963,014, issued June 12, 1934, to Roy W. Brown, plaintiff's Exhibit 7-H; and

British Patent No. 338,982, issued December 1, 1930, to H. L. Kirke, plaintiff's Exhibit 7-I. Reporter's Statement of the Case

Copies of these patents, as enumerated above, are by reference made a part of this finding.

20. In addition to the art cited by the Patent Office during the prosecution of the patent in suit, the following patents and publications were available to those skilled in the art on the respective dates indicated:

U. S. Patent No. 706,746, granted August 12, 1902, to B. A. Fessenden, defendant's Exhibit 57-A:

K. A. Feisenden, defendant's Exhibit 57-A;
U. S. Patent No. 693,651, granted July 4, 1905, to R. A. Fessenden, defendant's Exhibit 57-B;

U. S. Patent No. 1,929,845, granted October 10, 1933, on an application filed September 29, 1930, to S. C. Haynes, defendant's Exhibit 57-G;

U. S. Patent No. 1,937,964, granted December 5, 1933, on an application filed April 6, 1932, to R. L. Jenner,

defendant's Exhibit 57-I; Principles of Wireless Telegraphy, by George W.

Pierce, published 1910, pages 316, 317, defendant's Exhibit 57-C;

Wireless Telegraphy, by Bernard Leggett, published 1921, defendant's Exhibit 57-D; Radio Telephony for Amateurs, by Stuart Ballentine,

published 1922, pages 33 to 36, and 58 to 90, inclusive, defendant's Exhibit 57-E;

Admiralty Handbook of Wireless Telegraphy, published 1925, pages 432, 433, defendant's Exhibit 57-F, Air Commerce Bulletin, published July 15, 1932, pages 33 to 45, inclusive, defendant's Exhibit 57-J; and Specifications Nos. 555 and 556, published March 3,

1932, defendant's Exhibits 57-K and 57-L, by the Department of Commerce, Aeronautics Branch, Lighthouse Service Airways Division.

Copies of these patents and publications, as enumerated

Copies of these patents and publications, as enumerated above, are by reference made a part of this finding.

21. The following prior art patents relate to and disclose radio antenna of the self-supporting tower type:

U. S. Patent to Brown, No. 1,963,014, issued July 12, 1934, plaintiff's Exhibit 7-H;
U. S. Patent to Haynes, No. 1,929,845, issued October

U. S. Patent to Haynes, No. 1,929,845, issued October
 10, 1933, defendant's Exhibit 57-G;
 U. S. Patent to Jenner, No. 1,937,964, issued December
 1933, defendant's Exhibit 57-I.

These patents all disclose a radio antenna tower of the selfsupporting type comprising a plurality of upright members Reporter's Statement of the Case interconnected or braced by rigid structural members, the towers being of pyramidal form with the lower ends thereof insulated from the earth by insulators.

None of the patents refer to any particular form of ground to be used in connection with the antenna, this portion of the transmitting system obviously being left to the choice of those skilled in the art.

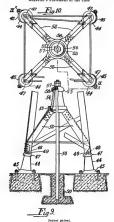
Figure 9 and 10 of the patent to Jenner are reproduced herwith. This tower as shown is of rectangular crosssection at the base and is provided with insulators 44 in each of the four legs and a central or strain insulator 54 in the center of the tower. The particular type of pyramidal selfimpporting tower shown in these figures and disclosed in the Jenner patent is substantially the same as the antenna tower used in the Government structures.

22. U. S. Patent to Stone No. 767574, issued August 18, 1904 (plaintiff Echibit 7-A), sets forth in the introductory portion of the specification that effective radiation of radio waves from an elevated conductor can be increased by "artificially increasing the natural electrical conductivity of the surface of the earth or other natural media in the immediate vicinity of the base of the transmitting-wire and maintaining said surface in a constantly-conducting stake.

The specification contains the following disclosure with reference to accomplishing the desired effects:

For making the surface of the earth more highly conducting and maintaining it in a constantly-conducting state a multiplicity of substances may be used. In the drawing I have illustrated one embodiment of my invention in which metallic wire-netting of large mesh, known as "chicken-coop" netting, is placed in electrical contact with the earth surrounding the lower end of the elevated conductor and is connected to the lower end of said conductor. Such netting has been used suc-cessfully for the purpose herein specified. I have also used a layer of commercial calcium chlorid, although any other deliquescent salt which by virtue of its moisture-absorbing properties will maintain the surface of the earth in a constantly-moistened condition may be used, and a layer of such salt may with advantage be spread upon the earth within the area covered by the wire-netting. A solution of water and any conducting salt may be used.





Reporter's Statement of the Case The drawing of the patent, which is reproduced herewith, is illustrative of the means whereby the conductivity of the surface of the earth in the neighborhood of the base of the antenna is increased.

No. 767,974.

PATENTED AUG. 18, 1904.

J. S. STONE. APPARATUS FOR THORSEASING THE SPECTIVE RADIATION OF ELECTROMAGNETIC WAVES. APPLICATION PLANS COT. SQ. 1809.

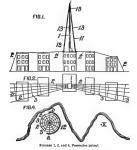


With reference to the size of the conducting surface or netting to be utilized the specification states as follows:

Although it is indicated by theory that any means employed to increase the natural electrical conductivity of the earth should extend from the base of the elevated conductor a distance equal to a quarter-wave length of the transmitted wave, it is to be distinctly understood that this length is merely the maximum length which may be advantageously employed, while excellent results may be obtained by using a much shorter length. In other words, the area of the netting or system of wires

other words, the area of the netting or system of wires or other means specified herein may be much smaller than the area of a circle whose radius is equal to a quarter-wave length of the transmitted wave, although better results are obtained as this area is approximated.

# No. 708748.



23. The U. S. Patent to Fessenden 706,746, issued August 12, 1902 (defendant's Exhibit 67-A), Figs. 1, 2 and 4 of which are reproduced herewith, discloses a vertical antenna having an artificial ground composed of a highly conducting surface extending outwardly from the antenna and located at the hass thereof.

As disclosed in the figures reproduced, the artificial ground consists of a plurality of radial wires laterally connected by other wires in the form of a spider web, the radial wires being grounded at their extremities. In connection with this disclosure the patentee states:

I have found that it is essential for the proper sending and receipt of these waves that the surface over which they are to travel should be highly conducting. more especially in the neighborhood of the point where the waves are generated. I have found that this highly conducting portion of the surface should preferably extend to at least a distance from the origin equal to a quarter wavelength of the wave in air and in the direction toward the station or stations to which it is desired to send the waves. Where the sending station is in a city or similar place where the waves may be cut off by high buildings or high trees, this highly conducting path should be extended still farther until it passes beyond the limits of the obstacle, and there the highly conducting portion, which may be in the form of a strip of metal or other conductor or of a number of wires, is connected to ground. This arrangement may be called a "wave-chute."

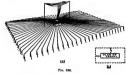
Figs. 1 and 2 disclose the arrangement of radio conductors in connection with the high buildings discussed, espra, by the patentee, and Fig. 4 discloses an artificial ground extending uniformly in every direction, Fig. 4 being referred to in the specification "as a plan view showing arrangement of station on rocky shore or other nonconducting erround.

The function of the ground system disclosed by the patent is stated in the specification as follows:

Another very important function of the construction here described in that it enables the capacity an saidinduction of the sending-station to be minimized contraction of the sending-station to be minimized contraction of the sending-station of the conditors of the sending-station of coast where sail spars sendines dashed up and reaches protings of the groundcoally insulating, hence changing the capacity and inductance of the sending-conductor. If, however, the surface he covered by the subvork or strips hereaforce static and the sending-conductor of the surface and the surface hereaforce where the surface and the surface static static surface and the surface and the surface static static surface and the surface and the surface static static surface and the surface and the surface static static surface and the surface and the surface static static surface and the surface and the surface static static surface and the surface and the surface static static surface and the surface and the surface static static surface and the surface and the surface static static surface and the surface and the surface static st Reporter's Statement of the Case

a constantly-conducting state. Hence the stations once tuned will not be put out of tune by changes of weather or other disturbances.

24. The Admiratly Handbook of Wireless Telegraphy, published in 1925 (defendant's Exhibit 57-F), describes in Section 584 what is referred to as "the earth screen." As illustrated in Fig. 336 of this publication, which is reproduced herewith, the earth screen is shown in connection with a vertical antenna having a flat too section.



Section 584 reads in part as follows:

The function of the screen is to intercept the lines of force from the aerial to earth and to carry the return current on the screen wires rather than by the earth.

Further, when the earth system is placed on or in the earth, heavy eddy current losses occur in the earth, owing to its poor conductivity. When the earth system is raised up, as in the "earth

screen," these losses are reduced.

The earth screen should extend on all sides beyond
the area covered by a plan view of the aerial system
by a distance equal to the height of the aerial.

The wires composing it should not be spaced closer than a distance three times the height of the screen above the ground.

At certain Naval Stations good results have been achieved by earthing the outer edges of the earth screen. In this arrangement, the ground scene comprises metallic wires which are concentrated or spaced relatively close to where the first in most intense. The description as quoted above also instructs those skilled in the art that the outer degas of the earth acreem may be grounded. The earth screen may be grounded. The earth screen may be grounded. The earth screen which the lines of force from the attenna may terminate, thereby preventing the penetration of these lines of force on the start of the more intense and the start of the start of the more intense and the start of the more intense and the start of the more intense and the start of the start of the start of the more intense and the start of the start of the more intense and the start of th

25. The book "Wireless Telephony" by Bernard Leggett, published in 1821 (page 82, defendant's Exhibit 57-D), after referring to a number of types of top-loaded vertical antennas, discloses the then prevailing practice for forming a metallic surface surrounding the base of the antennas for the portable transmitting stations of the British Army. The periment portion of this publication reads as follows:

A counterpoise is often used as with land stations, by means of a system of wires supported by the mast or man and the state of about 7 feet, i. e., just sufficient to prevent a near from striking them with injury to himself and them. The British Army stations usually make use of

"earth mats" either with or without a counterpoise of wires. These comist of copper gauer rolls about 1 yard wide and 10 yards long, connected together and to the account of the common section of the control less act as a counterpoise chiefly by capacity effects, whereas if the location is dumy (they are preferred intentionally made wet by pouring water on them) they This gives a rapid means of "garthing" together with

an earth of constant properties.

The number of such earth mats may vary, and they are usually arranged symmetrically around the wireless stations.

This publication discloses to a man skilled in the art an approximate equi-potential metallic surface approximately 30 feet square beneath the antenna. In this construction the lines of force from the lower portion of the antenna terminate upon the earth mats, which form a low loss metallic connection to the ground lead of the generator contrasted to earth itself, and thereby prevent the penetration of these lines of force into the earth with its attendant losses within the area of the concentrated field.

28. The publication "Principles of Wireless Telegraphy" by George W. Perces, published in 1910 (defendant's Exhibit 57-C made a part hereof by reference), pages 35 and 18 and

In precise, for a mall station a satisfactory ground can be obtained by a connection to the pipes of a water and the obtained by a connection to the pipes of a water to bury a netting or network of wree at a short depth below the surface of the earth. This may be supplied to the surface of the surface. When the station is break on the surface of the surface of the surface of the surface of the surface. When the surface of the best of the surface of the best of the surface of the best of the surface of the surfa

This publication discloses to a man skilled in the art a ground system comprising a network of wires buried at a short distance below the surface of the earth supplemented by wire netting spread out on the surface of the earth to form an equi-potential surface to reduce ground losses in the antenna system.

27. The publication "Radio Telephony for Amateurs" by Stuart Ballantine, Second Edition, copyrighted 1922 (defendant's Exhibit 57-E made a part hereof by reference), contains a rather complete discussion of problems involved in radio transmission and suggests certain solutions therefor.

In the chapter beginning page 58 entitled "Antenna Construction," the publication refers to various types of antenna struction,"

struction," the publication refers to various types of antenna and ground systems therefor.

Under paragraph 18 of the publication entitled "Require-

Under paragraph 18 of the publication entitled "Requirements for Transmitting," the various losses of energy are listed, and included in the listing, as items 3 and 4, are the following:

Loss due to heat developed in the earth (earth resistance) by currents returning to the lead-in.
 Loss due to imperfect dielectrics in the electric field of the antenna.

The publication then takes up in detail the consideration of the various losses set forth, and in Section 22, which is entitled "Losses Due to Earth Currents," enters into a rather complete discussion of these losses and means for reducing them to a minimum. Paragraph 22 reads in part as follows:

The third source of loss, usually the most prolific in antenna systems, especially at short wavelengths, is the best generated in the earth by the currents returning to or coming from the sal-on. Rumembering that the lest colle of the earth material goes up as the square of the current density at that point; consequently in order to keep down the whole loss the concentration of current at any point is to be avoided. The distributions of current and the concentration of the concentration of the sate of the concentration of the careful services are successful.

The above quotation is indicative of the fact that the conductivity and dielectric constant of the earth were both recognized in the prior at as affecting the distribution of current. The paragraph further states—

The current converges toward the lead-in and the current density is therefore greatest at this point. In the antenna system, the current flows by a conductive path up through the antenna conductors, thence by capacity paths to the earth, and finally through the earth to the lead-in. It is precisely the concentration of current here that causes most of the loss in the average grounding system. The loss may be diminished by reducing the current concentration, and this may be accomplished by providing a generous surface in the grounding electrode.

28. Section 28, entitled "Direct Ground," describes a type of ground known in the art as "Bound's Round Ground." As described, this consists of a ground electrode comprising a short circular cylinder of large radies with its lower edge buried in the earth, a depth of two or three feet being suggested for earth of not too poor conductivity and for wavelengths of from 200 to 300 meters. The section goes on to extend.

The connection is made by means of a number of wires which converge to the approximate center of the circle and unless the cylinder is very deep, and in any case if it is more than 15 feet in radius, should be supported above the earth and not buried in it or laid upon the surface. The cylinder itself may be made up of galvanized-iron sheets, such as are used in the construction of small temporary shacks. These need not be soldered together, but should overlap with no sharp edges protruding any distance from the body of the cylinder. A. connection should be made to each sheet. They are bet-ter soldered, however, if it can be done. The ground is installed by digging a narrow circular treuch under the antenna, not too far from the point at which the lead-in in the antenna diagrams, Figs. 45, 46 and 47, enters the earth. While it is not strictly necessary that the cylinder should be circular, this is the best form and no extreme departures which are likely to introduce sharp corners should be made.

This section of the publication discloses to those skilled in the art a ground screen comprising a plurality of radiating wires extending from a common central point under the antenna and not too far from the point at which the lead-in of the antenna enters the earth, these radiating wires being grounded at their ends or at the periphery of the circular area covered thereby.

29. Sections 24 and 25 discuss what is known in the art as the "counterpoise," and these sections are illustrated by Figs. 53 (a) and (b) and Fig. 54, all of which are reproduced heaven'th. Reporter's Statement of the Case

Section 24 reads in part as follows:

Lay upon the earth a large metal disc and connect this to the lead-in [Fig. 53 (a)]. The currents will now find a large conducting surface and on account of the large area and circular shape of the plate a fairly low resist-



Fig. 53.—Illustrating equivalence of counterpoise (b) and surface electrode (4) in securing more uniform distribution of parts currents.

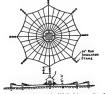


Fig 54.-Model counterpoise system in which the design suggestions of this article have been incorporated.

ance ground will be obtained. There will probably be a slight concentration of current at the edges. This would make a very good ground and could be still further improved by extending its edges down into the earth as in the cylindrical ground system just described. The plate need not be on the surface, but may be supported Reporter's Statement of the Case

above it as shown at (b), Fig. 53. The current flow is practically unaffected by this change and is completed through the condenser formed by the disc and the earth's surface. This system is found experimentally to yield a very low ground resistance, as the above reasoning would lead us to expect. From a practical point of view, however, a metal plate of this size is inconvenient and expensive. The advantages of the arrangement are not lost nor materially diminished if a net of wires is substituted for the plate, provided the wires of this network are sufficiently pientiful and they are not too far apart compared with the distance above the earth. Such an arrangement (b). Fig. 53, is called a counterpoise or canucity ground, and if properly designed and installed, is the most desirable and satisfactory type of ground for the amateur, especially in localities where the earth conductivity is poor.

Section 25 relates to the construction of the wire counterpoise, and the pertinent portions of this section are as follows:

The area of the counterpoise should be as large as possible since the distribution of earth currents is directly affected thereby. The exact shape is not generally important, but the best forms are the circular, elliptic, square and rectangular, in the order given. It should be placed as nearly under the antenna as possible and should extend well out beyond the antenna's projection on the earth. The number of wires should be as large as possible and the wires should be frequently bound together with cross jumpers. This will reduce to a minimum the generation of heat due to current vortices which form as a result of its possibly irregular shape and situation. The height of the counterpoise is governed by several considerations, the most important of which are the separation of the wires in the network, the evenness of the ground, the character of the vegetation with which it is covered, its conducting qualities, and the possible presence of ground water near the surface. If the height is small compared with the distances between the wires in the net, there will be a tendency for concentration of the current immediately under the wires. \* \* \* Bushes, grass, and other flora under the counterpoise constitute poor dielectrics and in order to make the volume of dielectric which they represent as small as possible compared with the total dielectric, the height of the counterpoise should be increased when they are present. A similar remark holds for any type of poor dielectric. \* \* \*

The above precautions and desirable features have

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been incorporated in the design of a typical counterpoise system shown in Fig. 54. This may serve as a model in planning a counterpoise for any special situation. More detailed specifications would be of no particular value on account of the wide variation of conditions likely to be encountered by the readers of these pages. For fairly even ground covered with short grass, a height of 2 or 3 feet will be adequate; for uneven ground or ground covered with bushes and undergrowth, heights two or three times this will be necessary for best results.

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. . The only way to ground the counterpoise would be to bury a circle of plates at its periphery, thus making a very large direct ground of the type described in the last section.

30. Sections 24 and 25 of the Ballantine publication disclose to those skilled in the art a ground screen or shield composed of a network of wires and located as nearly under the antenna as possible, elevated above the surface of the ground from a minimum of from two to three feet to a maximum of six to nine feet depending upon the character of vegetation underneath the screen, the screen being grounded at a multiplicity of points at its periphery. The disclosed function of such a screen is to provide a

low resistance metallic surface underneath the entenna for the nurnose of shielding the antenna from dielectric losses. preventing an intense electric field from existing at the surface of the ground, and reflecting or returning energy to the antenna which otherwise would be normally lost, 31. In Section 33 of the Ballatine publication the author

discusses the antenna systems located on the roofs of houses. This section states in part as follows:

The chief disadvantage of these systems is that a great deal of material, dielectric and conducting, is directly under the antenna, in the most intense part of its field. The resulting dielectric and other losses will therefore generally be quite high. In the case of a house with a tin roof well bonded together electrically, there is sometimes an advantage in grounding the tin at its four corners, or in as many places as possible, by running a separate lead from each point of connection directly to the ground. The grounding of these leads should be well done; otherwise the supposed advantage may be turned into an increased loss. The ground-lead from the transReporter's Statement of the Care

mitting apparatus may then be connected to the tin roof. The effectiveness of this scheme increases with the amount of load in series with the antenna. This should not, however, be construed to mean that the antenna should be operated above its fundamental. Figure 63

illustrates this type of installation.

This section of the publication discloses and suggests to those skilled in the art that the metallic roof of a building may be grounded at a multiplicity of points at its periphery, thus establishing a metallic screen below the autenna upon which the lines of force from the antenna may terminate, thereby preventing dielectric and other losses which would otherwise OCCUP

#### PRIOR TISES

32, Broadcasting station WAVE of the National Broadcasting System is located at the Brown Hotel, Louisville, Kentucky. This station was erected in 1933 and has been operating in regular commercial daily broadcasts from December 20, 1933, until at least as late as May 11, 1939.

The antenna is located on the roof of the hotel, which is shout 180 feet above the ground. The antenna comprises a single vertical self-supporting, four-cornered pyramidal tower 209 feet in height, insulated at its base from the supporting steel framework by means of porcelain insulators.

The hotel is of structural steel and brick construction and the roof is a concrete slab with asphalt covering. A roof screen was installed at the time of erection of the antenna tower in 1933, the same comprising approximately forty copper strips one thirty-second of an inch thick by two inches wide laid radially on the roof and radiating outwardly from a center beneath the base of the tower to the edges of the roof, covering an area approximately 45 feet by 75 feet. These strips were connected to the grounded water pipes of the building, the copper flashing of the roof, and to all metallic pipe systems in the building.

The radial strips were tied together by lateral strips of the same size at intervals, and metal plates, each approximately 316 feet square, were laid beneath each corner of the tower-supporting members, the edges of these sheets beReporter's Statement of the Case ing approximately nine feet apart. These sheets were also connected or bonded to the radial strips.

This roof screen was for the purpose of increasing the radiation efficiency of the antenna and returning to the antenna, or tower, energy which would otherwise be lost, were the screen not present.

The antenna and the roof screen installation at the Brown Hotel is open to the inspection of the public and it has been the custom of guests of the hotel and guests of the roof garden to have access to the roof, a picket fence being built around the base of the tower to prevent members of the public from coming in contact with high-tension portions of the tower.

While the radial strips are partially covered with asphalt or roofing compound, their presence and use as a ground screen are apparent to those skilled in the art, as shown in a series of photographs (defendant's Exhibits D-1s to D-24, inclusive), which are by reference made a part of this find-

ing.

38. Broadcasting station KSO was erected on the roof of
the Register and Tribune Building, a 13-story structural
steel reneforced building in Des Moines, Iowa. This station
was completed and in regular broadcasting service as a part
of the National Broadcasting System from November 5, 1989,
until October 3, 1985, when the station was moved to another location.

The antenna, which was located on the roof of the building, comprised a single vertical self-supporting four-cornered pyramidal tower approximately 156 feet high mounted on a steel framework of 1-beams, the base of the fower being insulated therefrom by means of four corner insulators approximately two feet above the roof. The concrete roof on which the antenna tower was placed was approximately the feet square.

The ground system of the antenna included a mesh or net of copper wires laid directly on the roof, the wires being spaced from 18 to 24 inches apart and bonded to each other at the points of intersection and to all metal parts on the roof.

Strips of wire mesh, known as fox wire or chicken wire, approximately 30 feet long, were laid upon the roof directly

under the vertical tower and extending outwardly in various

directions therefrom. These strips were bonded together and also bonded to the copper wires. The wire network and the fox wire strips were covered

with a coating of tar and pebbles, this covering, however, being so thin that the fox wire was visible in places, as indicated in a photograph taken on or prior to March 1, 1933 (defendant's Exhibit 13), which is by reference made a part of this finding

The fox wire strips were visible to a sufficient extent to show the use of a ground screen located under the antenna tower

While not accessible to the general public, the antenna and ground system employed at KSO was available for inspection on request of interested individuals, such as radio engineers and those associated with engineering schools, and such inspections were made on various occasions.

34. Broadcasting station WKRC was erected on the roof of the Alms Hotel at Cincinnati, Ohio. The antenna system as erected and placed in operation in the fall of 1933 comprised two Blaw-Knox self-supporting type narrow base steel towers 154 feet high insulated at the base, the insulators resting upon frameworks of steel beams.

Upon the roof and under the base of each tower there was provided a #10 mesh copper screen extending some four feet beyond the steel work of the tower foundation on all sides, except where the parapet roof wall occurred. These screens each contained approximately 500 square feet of material. They were connected to each other by a copper strip running across the roof of the hotel between the two towers. and the screens and strip were further connected to the building framework and to water and ventilator pipes of the building, as well as to a buried ground network at the base

of the building. Station WKRC began commercial operations as a part of the Columbia Broadcasting System in the fall of 1983 and has been operating ever since, with the exception of a short period during the summer of 1934 when a heavy storm dam-

aged the vertical towers, which had to be replaced.

Reporter's Statement of the Case The ground screens used in conjunction with these towers were laid directly upon the roof, and, with the exception of a few weeks during the constructional period, were covered by a coating of roofing paper and roofing compound which entirely concealed them. The presence or use of these screens would not be apparent to anyone inspecting the

transmitting equipment of this station. The screens of station WKRC were specified by the Columbia Broadcasting System, the owner of the station. and were installed in accordance with its specifications, which specifications are in evidence as defendant's exhibit 51-D made a part hereof by reference. The screens were

used uncovered for a period of some weeks after they were installed and were then covered with roofing paper and asphalt, not for the purpose of concealing their use, but simply for the purpose of protecting the screening. There has never been any occasion to or any attempt in suppression or concealment of facts or of the use of the

screens from the public. The covering above-mentioned made no difference in the functioning of the screen. 35. The prior art and use referred to in Findings 22 to 34. inclusive, indicate that prior to any effective dates of the

Schuler invention those skilled in the art had knowledge-(a) That both the conductivity and dielectric constant of the earth affected the distribution of current adjacent the antenna, and that a loss of energy was likely to occur by the

penetration of the lines of force through the earth to a buried ground system:

(b) That a variation in the pattern of the radiated waves from the antenna would be caused by variations of conductivity in various portions of the ground under or adjacent to the base of the antenna:

(c) That a metallic ground screen located under the antenna, elevated above the surface of the ground, and grounded at various points in its periphery, would function to reduce the effects set forth in items (a) and (b) and would therefore return or reflect energy to the antenna which would otherwise be lost

36. The beneficial effect of ground acreens located at the base of the antenna was well known to those skilled in the art, and to utilize such a ground screen in connection with a pyramidal tower antenna such as is disclosed in the prior art (see Finding 21) would not produce any novel or unforeseen result and would not involve invention. Claim 4 in issue is invalid.

37. If claims 5 and 7 are so interpreted as to disregard the specific limitation contained therein as to the ground screen or metallic plate member being located on the "ends of the insulators," these claims will be invalidated in view of the prior knowledge and use of ground screens located at the hase of the antenna.

The court decided that the plaintiff was not entitled to mecover

LITTLETON, Judge, delivered the opinion of the court: In view of the facts clearly established by the evidence

of record, which facts so far as pertinent to the questions of validity and infringement now before the court are set forth in the findings, we are of opinion that claim 4 of the patent in suit is invalid under the prior art; that claims 5 and 7 as specifically limited are not applicable to the alleged infringing structure, and that if these claims are so interpreted as to disperard the specific limitation contained therein they, also, will be invalid in view of the prior knowledge and uses (findings 35, 36, and 37).

Claims 4, 5, and 7, which plaintiff alleges have been infringed by the defendant, are set forth in finding 9. These claims relate particularly to a ground screen used in connection with a radio broadcasting tower or antenna for reflecting electrical energy, which would be normally lost in the absence of such screen, and returning it to the tower. The disclosures of the patent in suit are set forth in finding 8. The description of the alleged infringing radio broadcasting tower and ground screen manufactured for and used by the defendant is set forth in findings 13, 14, and 15, The antenna of the alleged infringing structure comprises a vertical metallic tower, pyramidal in shape and of approximately square cross-section mounted on a concrete base extending two feet above the ground surface. An insulator is interposed at each of the corner legs of the tower and a center strain insulator is provided, all of which function to insulate the radiating portion of the tower from the earth. These insulators are located in a plane eight feet above the concrete base of the tower and ten feet above the ground.

Associated with each antenna tower is a conventional buried ground system comprising wires extending radially in all directions from the tower and connected to the grounded side of the exciting means for the tower. In addition, a metallic framework supports a horizontal reticulated metal netting or screen which is positioned approximately two feet below the insulators of the tower and eight feet above the surface of the ground. This screen is approximately 50 feet square, the length of each side thereof being approximately eight times the length of each side of the tower, the spacing of the tower legs being six feet. This screen is grounded by being electrically connected to the buried ground system at the center and at the periphery of the screen. This ground screen so used in the Government structure possesses the dual function of providing a uniform electrostatic capacity for each radio broadcasting tower regardless of varying heights of snow or vegetation in the vicinity of the tower and for reflecting energy, which would be normally lost in the absence of such a screen, and returning it to the tower.

The terminology of claim 4 of the patent in suit is applicable to the Government structure. Claim 4 is as follows:

A wave antenna tower comprising a plurality of upright members interconnected by rigid structural members, said tower being of pyramidal form with the lower base ends thereof insulated from the ground by insulators, and means below said insulators for reflecting energy normally lost and returning it to the tower.

Claims 6 and 7 of the patent in suit contain phraseology specifying a definite relationship or location of the screen with reference to the insultors of the radio antenna tower and the phraseology of these claims as so limited is not applicable to the Government structure in which the alleged infringing screen is located two feet below the tower insulators. These chisms are as follows:

### Quinion of the Court

5. In a radiating tower antenna, a base support, insulators mounted on said support, and a condenser formed by metallic members on the opposite sends of said supporting a grounded electrically contained in the condense of the condense of the condense of the ground and a metallic tower structure disposed above said insulators. [Limiting phrasology its licited.]

inspices any minimum insolutors. Lumining pursecongy,

7. In a radiating tower antenna, a base support, insulators mounted on said support, and a condenser
formed by metallic members on the opposite ends of
said insulators comprising a grounded electrically conducting metallic plate member disposed in a plane substantially perpendicular to the axis of said towers of all
stantially perpendicular to the axis of said towers of the
tallic tower structure disposed above said insulators.

[Limiting phraseology italicined.]

If the specific limitation of these claims that the ground screen or metallic plate be "disposed on the ends of the insulators closer to the ground" is interpreted to mean only that the screen or plate be placed below the tower insulators, the phraseology of these claims would be applicable to the Government structure.

As set forth in finding 8, the patent in suit discloses a conventional vertical radiator in the form of an antenna tower. rectangular in shape, formed of structural steel members and girders having a relatively broad base tapering to a narrow top. The entire structure is provided with a plurality of insulators at the base of each leg of the tower. Mounted upon each end of the insulators there is a shield or screen which functions as a condenser. The entire system is supported above ground on a foundation structure. Screen 6. fig. 1. finding 8, with which this suit is concerned, is connected at a multiplicity of points along its boundary or edges by leads to a conventional buried ground system which, as stated in the patent, may be either radial or a grid of wires. Such a screen is known in the art as a grounded counterpoise and was claimed as such during progress of the application resulting in the patent in suit. The drawings of the patent give no indication of the extent of the ground system, except that it was substantially co-extensive with the ground screen. The specification gives no indication

of the extent of this ground system, other han it is conventional one. There is no indication in the patent of the height of the base for the tower, nor the elevation of several few and the state of the base for the tower, nor the elevation of several height page 1, of the patent that "this seven being placed slightly above the surface of the ground, shields and prevents the intense electric field from existing at the surface of the ground." The testimony of planifirst witnesses, including that of the patents, with respect to the elevation of the sevens above ground. The testimony of planifirst witnesses, including that of the patents, with respect to the elevation of the sevens above ground is that the sevens will function of properties of the present and that the seven will be seven the product of the patents and that the seven will be seven the product of the present and that the seven will be seven the product of the present and that the seven the product of the present and that the seven the product of the present and that the seven the product of the present and that the seven the product of the present and the seven the product of the present and that the seven the product of the present and that the seven the product of the present and that the seven the product of the present and the seven the product of the present and the seven the seven the seven the present the seven the seven that the seven the seve

None of the claims in suit specify the exact manner in which the screen or counterpoise is grounded, the height the screen or counterpoise is above the surface of the earth, or the size or configuration of the screen or counterpoise, or the character of materials employed in the construction of the screen or counterpoise.

A consideration of the prior patents, publications, and uses described and discussed in findings 21 to 34, inclusive, shows that the principle and purposes with which the patent in suit deals were fully described and disclosed in patents and publications antedating the patent in suit. These prior patents, publications, and the prior uses set forth in findings 32 to 34, inclusive, disclosed and employed means for meeting and overcoming the problem of loss of energy around the base of a radio antenna tower in a way and by means identical with the means described and claimed in the patent in suit. They accomplished the same result. When tested by these disclosures it is clear, we think, that the patent in suit does not disclose or claim any new or novel device or means involving invention. Sections 4920 and 4886, R. S.: Smith v. Nichols, 21 Wall, 112: Union Paper Bag Machine Co. v. Murphy, 97 U. S. 120; Bates v. Coc, 98 U. S. 31; Cantrell v. Wallick, 117 H. S. 689: Morley Semina Machine Co. v. Lancaster, 129 U. S. 263; Eibel Process Co. v. Minnesota & Ontario Paper Co., 261 U. S. 45.

It is clear from the record that the claims of the patent in suit, as interpreted by plaintiff's witness, if antedating

Opinion of the Court the patents, publications, and uses set forth and described in the findings would be infringed by radio antenna towers and ground screens constructed in accordance with the disclosures and directions in the other patents, publications, and the screens actually used. Inasmuch, however, as these other patents, publications, and uses antedated the patent in suit, it is invalidated, because that which would infrince if later will anticipate if earlier. Peters v. Active Manufacturing Co., 129 U. S. 530; Knapp v. Morse, 150 U. S. 221; Miller v. Eagle Manufacturing Co., 151 U. S. 186. The proof shows that the radio antenna ground screen claimed in the patent in suit is the same, or substantially the same, as ground screens previously described and used, and that it performs the same function in the same way to obtain the same result. Roberts v. Rucr. 91 U. S. 150; Scwall v. Jones. 91 U. S. 171; Burt v. Evory, 133 U. S. 349; Brown v. Davis, 116 U. S. 100; Eabert v. Lippmann, 104 U. S. 333, 336; Electric Storage Battery Co. v. Shimadau et al., 307 U. S.

The facts further established by the record clearly show that prior to the effective date of plaintiff's invention those skilled in the art had knowledge that both the conductivity and dielectric constant of the earth affected the distribution of current adjacent to the radio antenna and that loss of energy was likely to occur by penetration of the lines of force through the earth to a buried ground system: that a variation in the pattern of the radiated waves from the antenna would be caused by variations of conductivity in various portions of the ground under or adjacent to the base of the radio antenna tower; and that a metallic ground screen located under the antenna, elevated above the surface of the ground, and grounded at various points in its periphery, would function to reduce the above-mentioned effects and would therefore return or reflect energy to the antenna which would otherwise be lost. The proof further establishes that the beneficial effect of ground screens located at the base of the antenna was well known to those skilled in the art and that the utilization of such a ground screen in connection with a pyramidal tower antenna, such as is disclosed in the prior art (finding 21) would not produce any novel or unforeseen result and would not involve

For these reasons, claim 4 of the patent in suit is invalid. Chaims 3 and 7, as specifically limited by the language thereof, as heretofore mentioned, have not been infringed by the defendant but if they are so interpreted, as plantial by the defendant but if they are so interpreted, as plantial tation that the ground screen or metallic plate member be located on the ends of the insulators, they are, likewise, invalid in view of the prior knowledge and use of ground screens located at the base of the antenna. The plaintiff cannot assert a broad contraction of its claims in order to a such a state of the plaintiff cannot assert a broad contraction of its claims in order to a such a state of the stat

51, 52; Smith v. Hall, 301 U. S. 216, 232.
Plaintiff is not entitled to recover and the petition is dismissed. It is so ordered.

Madden, Judge; Jones, Judge; and Whaley, Chief Justice, concur.

Whitaker, Judge, took no part in the decision of this case.

COLUMBIA HALEY DOONER, ANOELA HALEY, KEELEY, MADELINE HALEY, GREVIEVE HALEY, MARGARET HALEY, PAUL C. HALEY, JOHN P. HALEY, WILLELMINA HALEY, MARY HALEY, MARYHA HALEY, MARYHA HALEY, MARYHA HALEY, MARYHA HALEY, HALEY, AN INFANT, BY WILLELMINA HALEY, HIS MOTHER AND NEXT FRIEND, v. THE UNITED STATES

[No. 44489. Decided January 5, 1942]

On the Proofs

Taking of private property for public use; completion by United Sistets Concernment of project began by State of Illinois. Whete plaintiffs were the owners of a trace of land in the Siste of Illinois, lying between the Illinois-Michigan Canal and the Canal and Canal Canal

Bame.—The valuation of property taken for public purposes is not an exact mathematical process.

The Reporter's statement of the case:

Mr. F. N. Towers for plaintiff. Mr. Norman B. Frost was on the brief. Dent, Weichelt & Hampton were of counsel. Mr. L. R. Mehlinger, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant.

The court made special findings of fact as follows:

1. On March 7, 1906, Patrick C. Haley and his wife, Mary
A. Haley, purchased from "The Canal Commissioners" of
the State of Illinois the following described real estate in
the State of Illinois:
All that part of the Southeast quarter of Section nine

(9). Township thirty five (88) North, Range ten (10) East of the third principal meridian lying North of Jefferson Street and between the West wall of the Deplahes River and a line two [3] feet East from and Deplahes River and a line two [3] feet East from and Street and Line of the Street and Line of Line of

The purchase price of the property was \$2,600, and The Canal Commissioners' deed, a quitelaim deed, was recorded on March 23, 1906, as Document 237775, Book 419, page 222, Office of the Recorder of Deeds, County of Will, State of Illinois. The sale was reported by The Canal Commissioners to the Governor of the State of Illinois as per minutes of the Commission's meeting July 22, 1906. At the time they made the deed, The Canal Commissioners owned the property in fee simple.

as. Philatisifis are the heirs of Patrick C. Halay and May.

A. Halay, who died in 1923 and 1927, respectively. The name of Margaret Halay Musser, appears in plaintieff pelition as Marks Halay Musser, but the error has been corrected by agreement of counsel. Plaintieffs, as the heirs of Patrick C. and Mary A. Halay, are the fee simple owners of the parcel of land described in finding 1, hereinafter referred to as the Halay strip. They alseg that this land referred to a the Halay strip. They alseg that this land that the formation of the Brastein Boost Fool as a part of the Illinois Waterweigh.

3. The Haley strip of hand lay between the Illinois-Midgan cansi and the De Plaines River, abutting on the Jefgan cansi and the De Plaines River, abutting on the Jefot of the bridge northward and at right angles to the bridge along the Canal. There was a narrow searth enhantment between the canal and the Haley Jefand. As the Haley strip was eight to ten feet below the level of the floor of the bridge, there was no setual physical access from the

to the bridge.

4. After the purchase of the property in 1908, Patrick
Haley planned the erection thereon of a three-story building,
the first floor at the water level for a warehouse, the second
story at street level for a store, and the third story for a

dwelling. The building was to be connected by a ramp at the street level with the Jefferson Street Bridge. 5. Mr. Haley consulted an architect and structural engineer regarding his plans. A 26' x 80' brick foundation was completed, after certain engineering difficulties had been

neer regarding his plans. A 26' x 80' brick foundation was completed, after certain engineering difficulties had been overcome, on or about September 1, 1913, but the proposed three-story building was never completed.

6. On Óctober 16, 1907, the General Assembly of Illinois adopted a resolution proposing an amendment to the Constitution, authorizing it to provide for the construction of a deep waterway or canal to extend from the foot of the Chicago Sanitary Canal, a drainage canal at Lockport, Illi-

#### S82 Reporter's Statement of the Case

nois, emptying into Lake Michigan, to a point on the Illinois and Des Plaines Rivers from Lockport to Ulics; for the recetion, equipment, and maintenance of power plants, locks, bridges, dams, and appliances for the development and unitiation of the waterway, and the issuance of bonds not to exceed \$80,000,000 to be used for the construction of the waterway. The proposed amendment was adopted by vote of the people on November 2, 1089, and proclaimed on November 2, 1080, as separate section 3 to the Constitution water and the section of the proposed amendment of the three plants are presented as the proposed amendment was adopted by vote of the people on November 2, 1080, as separate section 3 to the Constitution of t

of 1870.

7. By act of General Assembly of June 17, 1919, construction of the deep waterway was authorized, and by the same act a \$20,000,000 bond issue was authorized for construction of the waterway.

The Department of Public Works and Buildings, among other things, was surhorized to prepare plans and specifications for the construction of the waterway; to acquire by donation or purchase all property necessary or incident to donation or purchase all property necessary to be taken or damaged for the construction of the canal; to repair, replace, or reconstruct any or all public bridges along the line of such waterway; in order to provide acts and sustable navigation along such waterway; provide and the contraction and or acts waterway; the contraction of t

necessary to carry into effect the powers granted.
By sections 23 and 24 of the act the State was made
liable for all damages to real estate or personal property,
within or without the radius or zone of the waterway,
which should be overflowed or otherwise damaged by reason of the construction, maintenance, and operation of the
Illinois Waterway and its appurtenances, and the act provided that all claims for damages to property should be
vided that all claims for damages to property should be
Public Works and Building fixed by the Department of
Public Works and Building the lains of damy monits
provided for the navment of such lains of damy monits
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8. The plans for the Illinois Waterway and all bridges were originated by the State of Illinois. They were approved by the Secretary of War in 1919. Construction was Reporter's Statement of the Case
undertaken by the State under authority of the constitutional amendment of 1908 providing for the bond issue of
\$20,000,000 and the provisions of the Waterway Act of
1919, referred to in finding 7.

9. The plans contemplated the erection of a series of locks and dams, one of which was to be at Brandon Road, 6 miles below Lockport and 2 miles below Joliet. Since the surface of the pool would be from 1 to 8 feet higher than the streets of the city of Joliet, concrete retaining walls to confine the nool within the desired limits were to be built.

10. By 1930 the state had expended \$15,500,000 of the bond issue on the waterway and the work was about 75% completed. The remaining funds, however, were not sufficient to complete the project.

11. By the act of July 3, 1930 (46 Stat. 919, 929), Congress authorized the appropriation of a sum not to exceed \$\frac{y}{x}\$,000,000 for completing the improvements to the Illinois Waterway, in accordance with and subject to the conditions set forth in the favorable reports of the Board of Engineers upon this matter.

The report recommended, among other things, that the State of Illinois construct the new bridges needed and make all necessary alterations in existing bridges, the bridges note to become the property of the United States and no objection to be incurred by the United States and no objection to be incurred by the United States to maintain, operate, or replace they

12. Before the United States undertook the work authorized by the act of July 3, 1980, the State of Illinois had done some of the work necessary to create the Brandon Road pool. Thereafter, construction work, except the building of the bridges, was done under the supervision of the United States.

The first work done by the defendant in the vicinity of plaintiffs' property was performed under a contract with Green & Son Company entered into September 11, 1981, to construct a part of the wall of the Brandon Road pool.

The project necessitated the demolition of the old bridge at Jefferson Street and the construction of a new bridge, higher than the old one because of the planned increase in the Reporter's Statement of the Case water level. Dismantling of the old bridge was begun in

April 1982 and the new bridge was completed March 1983. 13. On January 16, 1983, the Brandon Road Lock and Dam were closed by the defendant. The water surface elevation was at that time 627 feet above mean sea level and by February 2, 1983, the pool was completely flooded and the water brought to an elevation of 639 feet, which was to be the normal elevation of the pool. By that time

the Haley strip had been completely submerged.

After the pool had been formed, the defendant began the
work of excavating the canal bed and embankment at the
bottom of the pool, including the Haley property. This work
was begun on October 24, 1933, and completed February 19.

1994.

14. There is no record that a claim for damages was over filed by the Haley heirs with the State of Illinois on account of the flooding and excavating of the Haley strip by the United States. Mo claim was ever filed with the State of Illinois for damages to the Haley strip by reason of the demolition and reconstruction of the bridges at Jefferson and

15. All public waters are under the jurisdiction of the Department of Public Works of the State of Illinois. Permits for access from private property to public property are provided for under appropriate regulations. A permit is required in every case and is granted upon application being made therefor by the owner of the property where investigating justifies its issuance. No application for seak a permit.

was made by the Haleys, and no permit was granted.

16. Jefferson Street and Bridge in the City of Joliet, adjacent to which the Haley property was situate, was a heavily travelled thoroughfare, and plaintiffs' property was adapted to commercial use. In 1874 a store had been operated on

the property.

Cass Streets

From August 6, 1921, to August 6, 1931, an advertising company paid the Haleys as rental for use of the property \$40 per annum for billboard privileges.

 Plaintiffs and their ancestors have remained in undisturbed possession of the property since its purchase in 1906 449473—42—CC—vel. 98——27

95 C. Cla Opinion of the Court and have regularly paid the real estate taxes up to the time of its flooding by the defendant. Total taxes so paid amount to \$1,650.

18. The canal commissioners of the State of Illinois sold the land in question in this case to the Haleys for substantial, valuable consideration and collected taxes from plaintiffs thereon. The City of Joliet regarded and appraised this property as substantially valuable for commercial purposes, hased on the right of access to the bridge. It is not shown whether the taxes paid by plaintiffs, referred to in finding

17, included taxes paid to the City of Joliet. 19. At the time of its flooding by the United States the best use of the property with its probable right of access

to Jefferson Street Bridge was commercial. The fair, cash market value of the land was \$100 per front foot, or \$2,600; the foundation had a valuation of the cost of production, less 20 years' depreciation, of \$2,200, making a total value of \$4,800.

The court decided that the plaintiffs were entitled to recover

Mannen, Judge, delivered the opinion of the court: Plaintiffs sue to recover the value of land and improvements thereto taken by the defendant by permanently submerging the land in water. The defendant urges, first, that the State of Illinois had taken the land before the defendant came upon the scene, and second, that even if the state had not "taken" the land by its prior activities, it had destroyed all or most of its value before the defendant took it.

The State of Illinois in 1919 authorized by legislation the construction of the Illinois Waterway, a deep waterway between Lockport, Illinois, and a point on the Illinois River near Utica, Illinois, connecting certain drainage canals which flowed into Lake Michigan, the Des Plaines River, and the upper Illinois River which flows into the Mississippi. The necessary approval was obtained from the Secretary of War and construction was begun. The authorized amount of the state bond issue for the purpose was \$20,000,-

000.00. By the year 1930, \$15,500,000.00 of this amount had been expended, and the balance was not enough to complete the project. Plaintiffs' land had not been directly affected by the state's activities up to that time. It still lay between the old Illinois-Michigan Canal and the Des Plaines River. fronting upon and at right angles to a bridge over the canal and river. If the state project had been abandoned at that time, plaintiffs' land would still have been usable as it had been intended to be used in 1913 when plaintiffs' prodecessor had erected a foundation on it, in contemplation of building a three story structure, the first floor at the water level for a warehouse, the second floor at the level of the floor of the bridge for a store and the third floor for a dwelling. Because the building planned in 1913 was abandoned and no building had been contemplated since that time, no permit for access to the bridge had been requested. But the law of Illinois, and common experience, would indicate that a

permit could have been obtained if desired. This was the situation in 1930 when the defendant undertook to complete the water project, the state agreeing to build the new bridges made necessary by the raising of the level of the water which would result from the defendant's work. In April 1932 the state began the demolition of the old bridge and by March 1933 had completed a new one. On January 16, 1983, the defendant raised the level of the water and permanently submerged plaintiffs' land.

The State of Illinois would, in all likelihood, have sometime completed the project and submerged plaintiffs' land. if the defendant had not undertaken in 1930 to complete the waterway. The state had not, however, completed the project to the point of submerging plaintiffs' land and we do not regard the steps which it had taken, and its plans and hopes for the future, as having converted plaintiffs' land into a lawsuit against the state before the defendant took over the project. Whether the state's activities had gone so far that plaintiff could have sued it at all may be doubted, but we need not decide that. Before the defendant submerged the land, it had the same physical existence and substantially the same potentialities of use which it had earlier

had, though its prospects for the indefinite future were dubious.

It may be of some importance that what the defendant undertook to do was to complete the work begun by the state, so that it does not seem unfair to require the defendant to pay for what it took, even though the value of the property may have been prospectively impaired in some undetermined amount by the previous activities and plans of the state. The vultation of property taken for public purposes in out an exact mathematical process. It is important, however, that in a somewhat confused citation multiple use without being compensated at 10.

paner use without coing compensates at the defendant took from plaintiffs their lot of a frozenge of twenty-six feet, which was worth \$100.00 per front foot, and their foundation, worth \$2,000.00, and that plaintiffs are satisfied to recover \$4,800.00. Since plaintiff property was these on January 10,1883, it is necessary, in order to give them just compensation for the taking, that they be awarded interest from \$4,000.00. When that interest at the rate of \$4,000.00.000. We find that interest at the rate of \$4,000.000.000.

It is so ordered.

Jones, Judge; Whitaker, Judge; Littleton, Judge; and Whaley, Chief Justice, concur.

## SAMUEL H. WHITE v. THE UNITED STATES

[No. 44620. Doelded January 5, 1942]

On the Proofs

Pag and allocusors; U. S. Nava officer with dependent mother; isade predent forces from satisfied estate—Where such the will ind plaintiff's father, who died in 1958, all of his estate, including real estate and life insurance proceeds, was oferiate to decedent's wife and their two sons share and share allies; and where and estate was never divided and plaintiff and decedent's other and permitted their mother to use and easy the cultie increation of the contract of the contract of the contract of the in addition, plaintiff made an allotment monthly from his 400 Reporter's Statement of the Case

pay for the support of his mother during the period covered by the claim and counterclaim in the instant suit; and where said allotment and other contributions to his mother by plaintiff constituted a major portion of her support: it is held that plaintiff's contributions to his mother, represented by his interest in the estate income and said allotment, constituted a maintenance of a place of abode for his mother within the

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meaning of the Act of April 16, 1918, and plaintiff is accordingly entitled to recover. Same .- The circumstances disclosed by the record and the contributions made by plaintiff to his mother's support during the

periods of the counterclaim show that plaintiff "responded to a needy family condition" within the meaning of the Act of May 26, 1926.

The Reporter's statement of the case:

Mr. Rees B. Gillespie for the plaintiff. Mr. Mortimer B. Wolf, with whom was Mr. Assistant

Attorney General Francis M. Shea, for the defendant. Miss Stella Akin was on the brief. Plaintiff sues to recover rental and subsistence allowances

authorized by law for an officer of his rank having a dependent mother. The period for which such allowances are claimed began February 1, 1933. The defendant has interposed a counterclaim for \$1,339.15

on the ground that plaintiff was erroneously paid allowances for commutation of quarters, heat, and light on account of having a dependent mother for the periods January 1 to September 17, 1919, and June 25, 1920, to June 30, 1999

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The plaintiff, Lieutenant Commander Samuel H. White, brings this suit under the provisions of the Act of Congress of June 10, 1922 (42 Stat. 625), for rental and subsistence allowances because of his dependent mother for the period from February 1, 1933, to date.

2. Mrs. Katherine Howard White, plaintiff's mother, is a widow, eighty-one years of age, and resides in York, South Carolina. She has two sons, W. G. White, a widower with a son twenty-one years of age, and the plaintiff. W. G. White has made no contribution to the support of his mother within the period covered by this suit, save for his interest in the income from a mortgage of \$10,000, bearing six percent interest, owned jointly by his mother, himself, and the plaintiff herein.

3. Plaintiff has contributed \$100 a month to his mother by an allotment through the period covered by the present suit, i. e., from June 39, 1931, to date. From 1922 to June 30, 1931, he allotted his mother \$75 a month. In addition to the allotments before mentioned, plaintiff gave his mother money orders and checks which varied from \$25 to \$50 a month.

month. 4. Plaintiff's father died October 12, 1918, and his will probated April 3, 1919, provided that the insurance aggregating \$14,000, whether payable to a named beneficiary or his estate, should be divided equally between his widow and two sons. After payment of decedent's debts and funeral expenses, there remained approximately \$12,000, \$10,000 of which was invested in a mortgage at six percent on a building in Charlotte, North Carolina, W. G. White and plaintiff gave all the income arising from the mortgage to their mother. In items 2, 3, 5, and 6 of the will, plaintiff's father devised and bequeathed all of his property, real and personal. including all insurance, to his wife, Kittle H. White, and two sons, W. G. White, Jr., and the plaintiff, share and share alike. Plaintiff's mother was made sole executrix of the will. The estate was not sold or otherwise divided and distributed to the three beneficiaries but was at all times, and still is, held intact with each of the three beneficiaries named

having a one-third undivided interest.

5. There was also an amount of \$2,000 of the estate invested at two percent which returns \$40 a year to Mrs. White.

6. Plaintiff's mother requires approximately \$10 s month for living expenses. Her cousin, Miss Julis Howard, lives with her and is in charge of the house for which she receives \$28 a month. Living expenses by the month are \$6100 ws:

Food, \$45; electricity, \$4; clothing, \$15; coal, \$15; telephone, \$2; cook and servant, \$20; water rent, \$2; taxes about \$20.

7. In 1938, repairs to the mother's house cost about \$800, of which plaintiff paid the majority. Plaintiff bought and paid for most of the furniture in the home, as well as for papering and painting. An operation for appendicities in 1935 or 1936 cost \$400 and an attack of pneumonia in 1938 cost about \$200, for which plaintiff paid. These amounts were in addition to the revulsar Jollomet contribution.

8. Plaintiffs mother has lived in a home in York owned, under the terms of the will, in equal share by her and her two sons, the estimated worth of which is \$8,500, also approximately 300 aeres of land with tenant houses thereon. These farm lands produce no income. Mrs. White also owns four shares of stock in the Lockmore Cotton Mills which pay no dividend. Her personal property is estimated to be worth \$1,200.

10. The Lighted States has interposed a construction of 31,250.15 asserting that during the periods January 1 to September 17, 1919, and from June 25, 1920, to June 30, 1922, overapyments were made to plaintiff on account of commutation of quarters, heat, and light because of an alleged dependent mother in the sum of \$1,989.78; under the Act of April 16, 1918 (49 Stat. 509). From this sum of \$1,950.78 to summont of \$0,000.88 absen recovered by check-specific plaintiff on the property of the summon of \$1,950.78 to summont of \$0,000.88 absen recovered by check-specific plaintiff.

age in plaintiff's account with the United States.

10. During the period January 1 to September 17, 1919, and from June 26, 1920, to June 20, 1922, plaintiff contributed \$100 to the support and maintenance of his mother. Throughout these periods the mother's living expenses were approximately as set forth in finding 6, supra.

11. During the periods covered by the counterclaim, a son, W. G. White and an infant son, lived with his mother. W. G. White contributed \$20 a month to his mother and paid light and water bills and helped with the taxes.

 From January 1 to September 17, 1919, plaintiff held the rank of Lieutenant, Junior Grade, while from June 25, 1920, to June 30, 1922, his rank was Lieutenant. Opinion of the Court
The allowances for commutation of quarters during the
period of the counterclaim were from \$40 to \$60 a month.

13. During the period of the claim beginning February 1,
10.22 which (15. weekles up in that decades not be in the

1933, plaintiff's mother was in fact dependent upon him for her chief support. 14. During the periods of the counterclaim from January 1 to September 17, 1919, and June 28, 1920, to June 30, 1922,

1 to September 17, 1919, and June 25, 1920, to June 30, 1929, plaintiff maintained a place of abode for his dependent mother and during those periods responded to a needy family condition in an amount in excess of the allowances obtained by him during such periods.

The court decided that plaintiff was entitled to recover rental and subsistence allowances from February 1, 1933, and that defendant was not entitled to recover on its counterclaim.

LITTLETON, Judge, delivered the opinion of the court: On the question whether plaintiff's mother during the

period of the claim beginning February 1, 1933, was in fact dependent upon him for her chief support, the defendant concedes that she was so dependent under the rule applied and followed by this court (Tomlinson v. United States, 66 C. Cls. 697), even under the theory of the defendant that the total gross income of \$700 a year from property of her husband's estate was income of the mother in her own legal right. This total gross income was less than half of the reasonable and necessary living expenses of plaintiff's mother, as shown by the record, of \$1,596 a year. However, the gross income of \$700 a year from the property from which it was received was not exclusively the income of plaintiff's mother. Legally and in fact, as shown by the record, and as the defendant was expressly advised October 16, 1922, the plaintiff's mother had only a one-third interest in the property which produced this income, and therefore the separate gross income of plaintiff's mother in her own right was not more than \$19.44 a month. The fact that plaintiff and his brother, W. G. White, who each had and still have a one-third interest in the property, permitted their mother to have and use their portions of the income

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## Opinion of the Court

for her maintenance and support does not affect the question whether the contributions which plaintiff otherwise made to his mother in each during the period of the claim constituted her chief support. The manner in which the property of the estate of plaintiff's father was handled by the mother and the two some represented as to plaintiff as additional contribution by him to his mother insofers as his interest in the property and income thereform were interest in the property and income thereform were

concerned. Stather died October 19, 1918, and in a will which was probletd April 30, 1919, he left all of his property, real and personal, to his wife and two sons, share and share alike. None of the property was sold, the parties in interest agreeing, instead, to keep it instat and to invest the contract of the parties of the contract of the contr

we have said above with reference to the extent of the interest of plaintiff's mother in the property of her husband's estate, we think it is clear that the defendant's counterclaim for alleged overpayments allowed and made to plaintiff under the Act of April 16, 1918, 40 Stat. 530, is without merit, especially in view of the provisions of the Act of May 26, 1926, 44 Stat. 654. The theory of the counterclaim is that the entire property of the estate of plaintiff's father was in law and in fact the property of plaintiff's mother. On that theory it is contended that plaintiff did not at any time during the periods of the counterclaim maintain "a place of abode for a \* \* \* dependent parent" within the meaning of the Act of April 16, 1918, supra, and that he was therefore not entitled to any allowance as commutation for quarters for himself and dependent, if not furnished by the Government, and commutation for heat and light. During the periods of the counterclaim, as set forth in finding 10, plaintiff regularly contributed \$100 a month to his

Opinion of the Court mother for her support and maintenance and in addition his one-third interest in the home in which she lived. W. G. White lived in the home with the mother and made some contributions to the mother as set forth in finding 11. Plaintiff's contribution to his mother, represented by his interest in the home property and the \$100 a month, constituted a maintenance of a place of abode for his mother within the meaning of the Act of 1918. In any event, any doubt as to this was removed by the Act of May 26, 1926. supra, which directed the Comptroller General to allow credits in the accounts of disbursing officers for payments of commutation of quarters, heat, and light under the Act of April 16, 1918, supra, because of a dependent parent, and as rental and subsistence allowance under the Act of June 10, 1922, 42 Stat. 625, because of a dependent mother, made in good faith by disbursing officers prior to July 1, 1923 "where the pavec responded to a needy family condition in an amount at least equal to the allowances obtained by him." The circumstances disclosed by the record and the contributions made by plaintiff during the periods of the counterclaim show that he responded to a needy family condition within the meaning of the act last referred to in a total amount far in excess of the allowances paid to him. Hal-Joron v. Wnited States, 69 C. Cls. 59. The defendant's counterclaim is dismissed, and judgment

will be entered in favor of plaintiff for the amount due from February 1, 1983 (Tricou v. United States, 71 C. Cls. 286; Page v. United States, 73 C. Cls. 626), to date of judgment upon the filing of a report by the General Accounting Office showing the amount due in accordance with the foregoing findings of fact and opinion. It is so ordered.

Madden, Judge; Jones, Judge; Whitaker, Judge; and Whaley, Chief Justice, concur.

On March 2,1942, upon a report from the General Accounting Office, showing the amount due under the court's decision of January 5, 1942, judgment was entered for the plaintiff in the sum of \$10.031.71

# Reporter's Statement of the Case

# M. L. SHEPARD v. THE UNITED STATES

[No. 44724. Decided January 5, 1942]

On the Proofs

Gererment contract; error in his decopted as foocet submitted— Where phalattil, in response to introduce of decidation, who mitted a hid for furnishing coni; and where on sheet Nomitted a hid for furnishing coni; and where on sheet Noley of the conference of the conference of the contract of the contract of the conference of the conference of the percer of phalattin attemps; and make hich sheet was agreed by plaintif before submining, and where hich sheet was agreed by plaintif before submining, and where hich sheet was agreed by plaintif before submining, and where hich sheet was agreed by plaintif before submining, and where hich sheet was agreed by plaintif before submining, and where hich sheet was agreed by plaintif before submining, and where hich sheet stage of the conference of the conference of the contract of the conference of the c

The Reporter's statement of the case:

Mr. M. L. Shepard pro se.

Mr. Joseph Tubridy, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant.

The court made special findings of fact as follows:

 On January 19, 1989, the United States through the District Quartermaster at Littleton, Colorado, issued invitations to bid for furnishing coal to District Headquarters, Littleton, Colorado, and C. C. C. camps in the Colorado-Weomine District.

2. The invitation to bid was set forth on U. S. Standard Form 33 (revised) numbered C. C. C. 5819-39-38.

Form as (revised) numered C. C. 0.8018-30-40.
This invitation was designated as the "Short Form Contract," and referred to attached schedules for more specific details of the subject of the invitation to bidders. The attached schedules consisted of sheets numbered Two, Three, Four, Five, and Ten of Circular Proposal No. C. C. C. 5819-38-38. dated, January 19, 1393

3. Plaintiff entered on the face of the U. S. Standard Form 33 (revised) opposite the printed words "Bids for: Coal for C. C. C. Camp D G 107-C" and under the columns "Quantity, Unit, Unit Price, Dollars, Cents," these entries:
"300 tons \$3.75—\$1125.00."

4. Hem No. 10 of the schedule, on Sheet No. Ten, under the heading "Schedule of Requirements," set forth the number of tons contemplated by the proposal and an "Analysis of

Coal Required."

Under the heading "Bidder's Analysis," the contractor was required to fill in an analysis of the coal in percentages under the following items: "Moisture, Volatile, Carbon, Ash,

Sulphur, B. T. U."

There was also required to be inserted by the bidder the name of the mine, location of the mine, name and operator of the mine.

At the bottom of Sheet No. Ten, there appeared under the legend "Bid II, Truck Delivery Mine to Destination" the following items:

D. Cost per net ton F. O. B. mine (less excise tax).

E. Cost per net ton for trucking (mine to destination).

F. Cost per net ton at destination (D & E).

The bidder was required to fill in the prices opposite items

D, E, and F.

5. The entries under Item No. 10 were prepared for plaintiff by his attorney and were filled out as follows:

F. Cost per net ton at destination (D & E) 2.75

Plaintiff signed both Sheet No. One, carrying the price of

\$3.75 per ton, and Sheet No. Ten, setting forth the price of \$2.75 per ton, without noticing the variance in price.

6. The "Invitation, Bid, and Acceptance," C. C. C. Sells-9-88, to settle at Circular proposal No. C. C. C. 5819-9-88, were duly forwarded to District Quartermaster, Littleton, Colordo. The price of \$8.75 as a unit price per ton on the face of the Invitation, Bid and Acceptance form was unnoticed by the District Quartermaster when he signed the formal acceptance of the bid on the same sheet. Plaintiffs bid was excepted in the belief that it was the lowest bid at the price of \$8.75 per ton. The practice in the District Quartermaster's office with regard to

M. L. SHEPARD

Reporter's Statement of the Case
prices bid was to consider only the prices set out in the Scheduls of Requirements.

7. On March 4, 1939, plaintiff received an acceptance of his bid by the following telegram:

To Mr. M. L. SHEPHARD,

Meeker, Colorado.

You are being awarded this date 300 tons coal for DG-107-C on proposal 38. All deliveries to start im-

mediately and to be made to campsite. Award being mailed.

Sparse.

Plaintiff began deliveries at once.

8. On March 23, the District Quartermaster at Littleton, Colorado, forwarded to plaintif a letter enclosing a delivery order which set forth the price of \$2.75 per ton as the unit price. Plaintiff did not know until the receipt of this letter that the award was made on the basis of a price of \$2.75 per ton. 160 tons of cost had been delivered by this time.

9. Plaintiff on March 24, through his attorney, wrote the

District Quartermaster at Littleton, Colorado, calling attention to the variance in the bid prices:

As per our telephone conversation on the above date, your attention is called to the variation in the bid as

contained in Sheet No. One of \$1,125.00 and the amount of \$25.00 as contained in the acceptance also shown on same sheet. Your delivery order also sets up the amount as \$25.00. In our conversation you called attention to the price set forth at \$2.75 on page No. 10 of the "Scheduled of Requirements," which was a typographical error.

10. On March 27, 1939, the District Quartermaster replied as follows:

In reply to your letter of March 24, 1889, relative to an error in the bid of Mr. M. L. Shepard, this is to advise that Mr. Shepard's bid, as shown on the reverse of Sheet No. 10, is the governing factor in the contract as it was not noticed that he had shown on Sheet No. 1 the price which he now claims is the correct price.

11. There are no directions on the U. S. Standard Form 33 as to whether the bidder or the acceptance officer shall fill in the quantities, unit prices, and the total amount of the bid under the heading "Quantity, Unit, Unit Price, Dollars."

12. The next lowest bid to that of plaintiffs was \$3.50 per ton for delivery at the campsite. Under the practice of awarding contracts to the lowest bidder plaintiff would not have been awarded the contract at the bid price of \$3.75 per ton.

13. The price of \$2.75 per ton in Item No. 10, Sheet No. Ten of the Schedule attached to the Invitation for Bids, was entered through inadvertence on the part of plaintiff.

entered through inadvertence on the part of plaintiff.

14. Plaintiff delivered 300.45 tons of coal under the con-

tract at the rate of \$2.75 per ton and has been paid \$826.23.

15. The reasonable value of the coal delivered by plaintiff has not been proved.

The court decided that the plaintiff was entitled to recover.

Manpen, Judge, delivered the opinion of the court:

Plaintiff, pursuant to an invitation issued by the War De-

Panning, pursuant to ski invitation issued by the Var Izeration, assumited a bif for trainishing coal for the Givilian Conservation Corps in Colorado and Wyoming. The invitation consisted of a printed "short Form Contract," and serval attached sheets. On the printed sheet plaintiff offered to furnish 300 loss at \$8.75 per ton, making a total price of \$1,125. On sheet ten of the statached papers, plaintiff filled in the prices as shown below:

### Bid II. Truck Delivery Mine to Destination

 D. Cost per net ton F. O. B. mine (less excise tax)
 \$2.00

 E. Cost per net ton for trucking (mine to destination)
 .75

 F. Cost per net ton at destination (D & E)
 2.73

The last two of these figures were inserted by error by plaintiff's lawyer, who prepared the papers for plaintiff. Plaintiff signed both the printed sheet and sheet ten, not noticing the erroneous figures on sheet ten.

The District Quartermaster looked at the price shown on sheet ten as was his practice, and did not notice the price shown on the printed sheet. On March 11, 1939, he sent a telegram awarding the contract to plaintiff, but making no mention of price, which he thought to be \$2.75 per ton and plaintiff thought to be \$3.75 per ton. On March 23, 1939, the unartermaster sent plaintiff a written deliver order show-

Reporter's Statement of the Case ing that the price was \$2.75 per ton. By this time 150 tons

of the coal had been delivered.

After the misunderstanding had been thus revealed, plaintiff claimed that he was entitled to the \$3.75 rate, but completed his deliveries of the rest of the coal contracted for. The defendant paid plaintiff at the rate of \$2.75 per ton. Plaintiff sues for \$300.45, which would give him \$3.75 per ton, the price he wrote on the printed sheet.

The misunderstanding here was due to carelessness on both sides, as a result of which the minds of the parties did not meet on the vital subject of price. But the defendant received the coal, and is, under the circumstances here shown, bound to pay for the benefit it has thus received. A ready measure of that benefit is a valiable, since the lowest unambiguous bid for the same contract was to furnish the coal as \$3.50 per to.

Plaintiff is entitled to recover \$225.34. It is so ordered.

Jones, Judge; Weitaker, Judge; Littleton, Judge; and Whaley, Chief Justice, concur.

STANLEY M. BARNES v. THE UNITED STATES

[No. 44744. Decided January 5, 1942]

On the Proofs

Pay and allocencer; unwarried Newy officer with dependent worker.—
Where it is shown by the evidence addressed that plainting
an unmarried efficer of the United States Navy, was in fact
chief support of his mother; it is Asid that plaintiff is
estitled to recover rental and substatence allowances for the
years 1897 and 1988, and to due to floatpment.

The Reporter's statement of the case:

Mr. M. C. Masterson for the plaintiff. Ansell, Ansell & Marshall was on the brief.

Miss Stella Akin, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant.

95 C. Cls.

# Reporter's Statement of the Case The court made special findings of fact as follows:

1. The plaintiff graduated from the United States Naval Academy and has been a commissioned officer of the United States Naval since May 29, 1394. He held the rank of ensign until July 2, 1937, when he was promoted to lieutenant, junior grade. From May 29, 1397, to January 8, 1398, plaintiff was on show duty, and he was on sea duty during the remainder of the period of this claim, to wit, January 1, 1937, to January 1, 1937, to January 2, 1937, to January 3, 1937, to January 4, 1937, to January 1, 1937, to January 1,

1867, to date.

2. Plaintiff's father died May 16, 1929. At the time of his death the father owned no real estate, but he owned personal property consisting of stocks and bonds valued at approximately \$4,690. He also left two insurance policies, one for \$700 and another for \$1,280. All of the property was left by will to plaintiff's mother.

 Plaintiff's mother, Harriet Mary Osborne Barnes, was born on March 5, 1879. She did not remarry after the death of plaintiff's father. She has one child besides the plaintiff,

a daughter, Irene Osborne Barnes.
4. During the period of this claim the mother's health was not good, which prevented her from engaging in gainful employment. Occasionally, for limited periods, she did secretarial work for an elemostrary institution, from which she

received a little pay.

5. On January I, 1987, the date of the commencement of this claim, plaintiff's mother owned no real estate. She owned some personal property consisting of stocks and bonds valued at approximately \$4,700. Since that time the stocks and bonds have decreased in value and the income therefrom has also decreased.

### Reporter's Statement of the Case

7. Of the personal property left har by her husband she disposed of some of the stocks, amounting to \$28,841.87, the proceeds of which were used by her for living expenses prior to January 1,1937. The proceeds of the two insurance policies referred to in finding 2 were used in the payment of her husband's funeral expenses, expense incident to the serious illness of her daughter immediately after the death of the father, and living expenses prior to January 1, 1937.

8. During the entire period of the claim the plaintiff's mother lived in an apartment at Concord, New Hampshire, the rest of which was 873 a month prior to August 1, 1939, and subsequent to said date it has been \$35 a month. The daughter lived with her mother until August 1939, during which time the daughter paid her mother \$940 a month for room and board, entire mother \$940 a month for room and board, entire a rot preside of \$50.00 a formals this room and board, entire a rot preside of \$50.00 a mother furnished room and board entire the president president of the control of \$50.00 a week.

9. The mother's household and living expenses for the year 303 were \$1.55.70; for 1088, \$44.042; for 1089, \$4,894.72; and from January 1 to June 17, 1940, \$4700. In addition to the expenses incurred for 1967, the mother gave \$183.25 toward the expenses of her daughter's summer school. Yearly the mother paid a poll tax of \$2 and a State tax on investments of \$5.06. The plaintiff's mother has at no time excession [60 eventues of a state tax on the excession [60 eventues of a state tax on the excession [60 eventues of a state tax on time excession [60 eventues of a st

10. The plaintiff made regular contributions for the support of his mother during the period of this claim by monthly alloments from the Nayy Department as follows: \$700 in 1937; \$740 in 1988; \$700 in 1989; and \$300 from January 1 to June 1, 1940. In addition to the regular monthly contributions, plaintiff gave his mother \$125 in 1937 and \$200 in 1988.

11. Plaintiff never married. Plaintiff submitted a claim to the General Accounting Office for rental and subsistence allowances on account of a dependent mother for the years 1937 and 1938, but the claim was disallowed. Plaintiff has operation of the Cart
mever been paid increased rental and subsistence allowances on account of a dependent, and claims such allowances for the period from January 1, 1937, to the date of judgment.

12. Plaintiff's mother was dependent upon him for her chief support from January 1, 1837 to June 1, 1940.

The court decided that the plaintiff was entitled to recover, entry of judgment being deferred until the coming in of a report from the General Accounting Office showing the amount due in accordance with the opinion per ouriam, as follows:

From the findings of fact it appears that for the year 1802 the plaintiff contributed to his modern's support 88500, and that her income from all other sources in that year was more income from the plaintiff contributed to her sources was 87772; for the year 1809 plaintiff contributed to her support 8700,00, and her income from all other sources was 84500; and from January 1, 1940 up until the first of June 1950 the plaintiff had contributed to the contributed to the property of the plaintiff has the plaintiff that the plaintiff th

It is, therefore, apparent that plaintiff was in fact his mother's chief support.

Included in her income from all other sources is a profit of \$2.00 a month which the mother made from furnishing room and board to her daughter. The daughter paid \$40.00 a month room and board, and the mother testified it cost her \$82.00 a month to furnish this room and board, leaving a net rofit of \$22.00 a month.

Entry of judgment will be deferred until the incoming of a report from the General Accounting Office showing the amount due computed in accordance with this opinion. It is so ordered.

#### Syllabus

#### WILMON TUCKER, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF SARAH E. SMITH V. THE UNITED STATES

[No. 44870. Decided January 5, 1942]

On Defendant's Demurrer

Income tag: claim of extate timely filed under section 262. Title 28. U. S. Code.-Where, as a result of hearings held from August 25 to October 6, 1930, it was known to the duly authorized representatives of the Government, including the Collector of Internal Revenue, that certain funds in cash in a safe deposibox and on denosit in a bank were held by one Reese B. Brown in trust for the use and benefit of plaintiff's decedent, Sarah E. Smith: and where during said hearings it was not disclosed to said Sarah E. Smith that the collector upon a warrant of distraint against said Brown had previously seized and impounded the then unknown contents of said safe deposit hox and the said funds on deposit on August 7, 1930; and where, thereafter, in November 1930 the collector withdrew and took nessession of the said funds in said safe densait how and an deposit, and deposited the total of these amounts to his credit as collector; and where after a determination of deficience against said Brown and Sarah E. Smith, and a feorardy assessment against Brown but not against Sarah E. Smith, and upon an appeal to the Board of Tax Appeals, while the said funds were being held as stated by said collector, stipulations were filed and a decision made by said Board on October 12, 1933. and thereupon, on or shortly after October 12, 1833, said collector collected and satisfied the deficiency determinal against Brown as well as the deficiency against Sarah R. Smith from the trust funds so held as stated, which said funds were for the use and benefit of said Sarah E. Smith, whose death had occurred on July 24, 1932; it is held that the claim of the estate of said Sarah E. Smith against the defendant had not accraed in a shape to be effectually enforced until said trust funds had been applied, as stated, and covered into the Treasury of the United States on October 12, 1933, and the petition in the Instant case, filed in the Court of Claims on September 16, 1989. was accordingly timely filed within the meaning of section 202. II. S. Code, Title 28.

Mr. George C. Dix for the plaintiff. Mr. Karl J. Hardy
was on the brief.

Mr. Joseph H. Sheppard, with whom was Mr. Assistant Attorney General Samuel O. Clark, Jr., for the defendant. Mr. Robert N. Anderson and Mr. Fred K. Dyar were on the brief.

The facts sufficiently appear from the opinion of the court.

Lerrarows, Judge, delivered the opinion of the court: The original petition in this case was filed September 16, 1899, to recover 182,504.75 on an implied contract. Kirkendal v. Dinted States, 90c. C.18. so N. The defendant densure to the petition on the ground that no cause of sction against the United States within the principle tion of the court is stated for the alleged reason that the chim searcted in the theory of the court of the court of the court is searched in the theory of the court of the court is searched to the court of the theory of the court of the court of the court of the court of the theory of the court of the court of the court of the court of the theory of the court of the co

Plaintiff replies that the claim made in the petition did not accrue within the meaning of section 262, U. S. C. A., Tit. 28, until October 12, 1933, less than six years prior to the filing of the petition. The facts alleged in the petition show the following:

L. Sarah E. Smith, an unmarried woman and a citizen and resident of King County, State of Washington, died July 24, 1932, at Montreal, Canada, while temporarily residing there, and that on July 9, 1934, plaintiff was duly appointed and qualified as administrator with the will annexed of the setate of Sarah E. Smith.

2. During 1929 and 1930 Miss Smith entrusted to one Reson B. Brown, of the State of Washington, sums of money belonging to her to be held by Brown for safekeeping and for her use and Benefit. At the time of her death in 1982 she was sevently years of age. Brown received the money under the arrangement for the use and benefit of Stark E. Smith and for atlekeeping by him, and on and 4fer August 1,200, had 850,004 thereoff in Chinel States currency in a 1,200, had 850,004 thereoff in Chinel States currency in past of the second of the second

in the Crocker First National Bank of San Francisco, California.

3. Prior to the death of Sarah E. Smith no accounting or settlement was requested of or made by Brown to her, and st all times Brown held the money in trust for safekeepings and for the use and benefit of Sarah E. Smith. No part of the money delivered and entrusted to Brown by Sarah E. Smith during 1929 and 1930, and so held by him between that date, or dates received by him, and October 19, 1933, was the private property of Brown.

was the private property of Brown.

4. On or shortly prior to August 7,1809, the Commissioner of Internal Revenue made a joopardy assessment of alleged additional rindvidual income tax, interest, and peaker against Roses B. Brown in the total amount of \$907,807.86.

Internal revenue and a more analysis of the second of the private for the collector sisted and impounded certain property distribute the collector sisted and impounded certain property of Brown and also levied the warrant of distribut topen the theat manner of \$80,840 belonging to Sarnh E. Smith was being held in the \$17 the Xalonda Safety Deposit Company at Kanass City, Missouri, and upon the sum of \$6,850 80 being in an account in his name in the Cooleer Fire National

Bank, San Francisco.

5. The funds so held by Brown in trust for the use and benefit of Sarah E. Smith, upon which the distraint warrant was levied as aforesaid, were not taken and applied by the collector as a collection prior to October 12, 1933, in satisfaction of the fax liability assessed aranta Brown.

6. September 25, 1990, the Commissioner of Internal Revenue prepared and anniel to Brown by registered mail a statutory notice of his final determination of a deficiency in his individual income tax, which, together with interest and penaltics claimed, amounted to \$407,507,66. In this deficiency notice Brown was advised of his right under the statute to the a petition within sizty skeys with the United deficiency and terminal by the Commissioner. Accordingly, deficiency and terminal by the Commissioner. Accordingly, the contraction of the Commissioner of the Contraction of the Contractio

Opinion of the Court

Brown prepared and filed with the Board a petition for a
redetermination of the deficiency.

7. Thereafter, and while Brown's petition was pending before the Board, the collector of internal revenue in November 1800 withdraw and took possession of the \$53,446 in and-deposit to & 192006 in the First National Safety Deposit Company at Kansas City, Mo., and also took possession of the amount of \$5400.30 on deposit in the Crecker First National Blank, San Francisco, and deposited the total of these trends are considered to a surface of the same of the same than the contract of the same thread the courts of the tax deficiency claimed by the Commissioner against Brown.

8. In August 1990 the Commissioner determined a deficiency in respect of the individual income tax of Sarah E. Smith for the years 1986 to 1989, inclusive, in the sum of \$87.734.6, and mailed her a statutory deficiency notice thereof, under which she had the right to file a petition with the Board of Tax Appeals for a redetermination. No isopardly assessment appears to have been made against Sarah E. Smith With the time allowed, Sarah E. Smith duly filed a petition of the property of the same statement of the same state

tion with the Board of Tax Appeals for a redetermination. 9. On August 25, September 9, 10, and 12, and on October 6. 1930, special agents of the Treasury Department, representing the Commissioner of Internal Revenue and the collector of internal revenue held hearings and examinations at Seattle, Washington, in connection with and relating to the income tax liabilities of Reese B. Brown and Sarah E. Smith as theretofore determined and asserted by the Commissioner. At these hearings Reese B. Brown and Sarah E. Smith appeared as witnesses and, upon examination by the Treasury agents, they both testified under oath with reference to the properties owned by them, and that the money on deposit in the account of Reese B. Brown in the Crocker First National Bank of San Francisco and the money in safe-deposit box #2026 of the First National Safety Deposit Company of Kansas City, amounting in all to \$59,910.39, belonged to Sarah E. Smith: that these funds were being held by Brown in trust for her, and they further testified that a trust relationship existed between Brown and Sarah E. Smith, that

#### Opinion of the Court

he was acting as her trustee in respect of such funds. The information thus furnished regarding the trust character of the particular funds mentioned was fully known to the duly authorized representatives of the government, including the collector of internal revenue, at all times thereafter and on October 19, 1983.

10. During the examinations and hearings by the special agents of the Treasury Department, as above-mentioned, they did not disclose to Sarah E. Smith that the collector and distrained upon the fundam entitioned, and held by Brown for her use and benefit, and it was not disclosed by the special agents at the fastrings mentioned that the collector had withdrawn and taken possession of such funds and had deposited them in a special account to his credit as collector of revenue. Sarah E. Smith was not advised at any time back the special control of the second of the sec

11. Thereafter, on October 12, 1033, while the aforement-inced fund of \$\$99,010.90 was being held by the collector in a special fund awariing final determination, a hearing wan had before the Board of 17 ax Appeals at Portland, Oregon, on the petition of Beese B. Brown with respect to his tax highlight and eterminately the Commissioner, and a stipulation of the second of the data liability of Board was supported to the deficiency in respect of the data liability of Board was \$\$80.04.75.

12. On the same day, to wit, October 12, 1935, the Board of Tax Appeals heard the petition of Sarah E. Smith at Portland, Oragon, for the redetermination of the deficiencies determined by the Commissioner in respect of her individual states of the Commissioner in respect of the individual samount of \$87,973.46, and it was stipulated between the Commissioners and Sarah E. Smith through Reese B. Brown as her attorney-in-fact that the deficiency in respect of her individual tax liability for the years mentioned was in the total amount of \$81,850.66. Decisions of the Board of Tax Appeals were entered upon and in accordance with the Appeals were entered upon and in accordance with the Appeals.

Opinion of the Court

13. As a result of the stipulations and the decisions of the board, the collector of internal revenue on or shortly after October 19, 1933, collected and satisfied the deficiency so determined in respect of the individual income tax liability of Brown by applying \$28,064.75 of the funds so beld by the collector, as hereinhefore stacks, in full satisfaction and in discharge of said tax liability of Brown, and thesespon and the state of \$20,064.75 into the Treasury of the United States.

United States.

14. In the same way and at the same time, to wit, on or shortly after Cetober 12, 1983, the collector collector deficiency of 33,186.54 in respect of the individual tax liability of Sarah E. Smith, deceased, by applying in suita-faction and dishearge thereof that amount from the balance of the funds so held by him, as hereinbefore mentioned, and covered the same into the Treasury of the United States.

Upon the foregoing facts the demurrer must be overruled. The facts alleged show that the collector of internal revenue without the knowledge or consent of the decedent took money which belonged to her and used it to pay and satisfy the individual tax liability of another person, for which tax she was in no way liable, and he did so as the authorized representative of the United States and with the knowledge that the money so used was not the property of the person to whose liability it was applied to satisfy. Until the funds belonging to plaintiff were so applied by the collector and covered into the Treasury, no claim of Sarah E. Smith or her estate for a money judgment against the United States accrued. If the decedent had known of the action of the collector in levying upon funds belonging to her under a distraint warrant upon an assessment against Brown, her only remedy prior to the date on which the collector actually applied a portion of the money as a collection of a tax due by Brown and covered it into the Treasury of the United States would have been a personal action against the collector proceeding for an injunction. But such a remedy, if it existed, did not represent or include a cause of action for a money judgment against the United States under section 262, Tit. 28, U. S. C. A. Such a claim did not accrue until the money was subsequently applied and covered into the Treasury of the United States. Until Reporter's Statement of the Case

then the claim of the estate of Sarah E. Smith asserted in this action had not accrued in a shape to be effectually enforced. Borer v. Chapman, 119 U. S. 587, 602; United States v. Wurts, 803 U. S. 414, 418.

The demurrer is overruled and it is so ordered.

Madden, Judge: Jones, Judge: Whitakes, Judge: and WHALEY, Chief Justice, concur.

HARRY MERRITT AND LUCIEN MERRITT, CO-PARTNERS, OPERATING AND DOING BUSINESS AS MERRITT DREDGING COMPANY, v. THE UNITED STATES

[No. 45089. Decided January 5, 19421 Government contract; rental of dredge "per hour."-Where in a con-

On the Proofs

tract with plaintiff, drawn by the defendant, for the rental of one hydraulic dredge and equipment, it was provided that rental at a price stipulated "per hour" would be paid; and where in said contract it was likewise provided that such rental "ner hour" would be paid while the dredge was not pumping due to breakdowns within stated limitations; it is held that plaintiff is entitled to recover on the basis of rental "per hour" and not "per pumping hour."

Bame.-A contract drawn by the defendant is to be strictly construed against it.

The Reporter's statement of the case:

Mr. George R. Shields for plaintiff. Mr. James T. Clark and King & King were on the briefs.

Mr. Gaines V. Palmes, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant.

The court made special findings of fact as follows: 1. During all the pertinent times herein mentioned plain-

tiffs were and now are citizens of the United States. They were partners engaged in the dredging business in the State of South Carolina, then and now operating under the name of Merritt Dredging Company, with offices in the City of Charleston, South Carolina.

2. On March 17, 1007, in response to defendant's invitation for bids by the United States Treasury Department, the property of the United States Treasury Department, the state of the United States Treasury Department of the tiffs submitted their bid for "rental of one hydraulic deed, go, including floating pipe line, shore pipe line, necessary attendant plant and histor and material necessary for the efficient operation of the plant, in secondance with the specifications and the rate of State One heart."

Plaintiffs' bid was accepted by letter dated March 24, 1937 from the State Procurement Officer to plaintiffs. The following are pertinent parts of the contract:

Rental of One Hydraulic Dredge, including floating pipe line, shore pipe line, necessary attendant plant and labor and material necessary for the efficient operation of the plant, in accordance with the specifications attached hereto, 250 Hours.

Above equipment to be rented at the rate of \$39.95, per hour.

per not

No work will be required on Sundays or legal holidays, therefore no payments will be made for time lost on those days. The price hold is to include all labor, the price hold in the price hold in the second of the there is no second of the dredge excepting common labor for shore crew. All operating expenses must be appendibly for injuries of any nature or from any source to men employed by him in connection with the work. He must show somes responsibility for any actwell. He must show somes responsibility for any acttated may be increased or decreased 85 percent. Halloss supplied.

2. Capacity—The drodge must have a suction and discharge line not less than 15 indexes in dismeter. The contractor must guarantee a capacity of not less than 400 cube yards per pumping hour. If the actual production, as determined by measurement, is less than this remarkable of the contractor must also guarantee and the contractor must also guarantee an average daily gumping time of not less than 12 hours per day while the drodge is actually engaged on the work, fowing times, Sundays and legal holidays not in.

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Beparter's Statement of the Case
aluded. The dreeden must be equipped a

cluded. The dredge must be equipped with ladder and applies of sufficient length to permit dredging in 18 feet applies of sufficient length to permit dredging in 18 feet applies of the property of the prope

 Character of material.—The material to be removed consists of marsh mud, probably some clay, oyster shell, logs, and debris. A portion of the area to be dredged is covered by marsh grass.

The dredged material is to be deposited as a ponded fill within disce constructed and maintained by forces employed by the Works Progress Administration. The bidder to furnish all labor, material, supplies, and equipment necessary to complete the estimated quantity of dredging within the time limits specified above. The Works Progress Administration to furnish the common Contractor to furnish the necessary supervisory per-

sonnel to direct the Works Progress Administration labor handling the pipe line on the shore.

(1) The work to be done consists of the removal and disposal of all material lying above the plane of 8 feet below mean low water within the specified area shown

on attached map.

(2) The total estimated quantity of material necessary to be removed from within the specified limits is 100,000 cubic yards place measurement.

Breakdown.—The Works Progress Administration will allow one hour accumulative time per 24-hour day for breakdowns. Time lost for breakdowns in excess of

this amount will not be paid for.

Payment.—Payment will be made as soon as possible after the completion of the work.

The dredge will be subject to inspection and acceptance by the Works Progress Administration.

3. Upon receipt of notice to proceed, plaintiffs placed their hydraulic Dredge Cherokee on the work and began dredging at 8 o'clock a. m., on May 17, 1937, and completed the dredging of 99,986 cubic yards by 7 o'clock p. m., on June 2, 1937,

the total time on the job being 347 hours.

4. The Dredge Cherokee was an efficient 17-inch suction,
15-inch discharge, hydraulic dredge, of a 650 H. P. capacity

and on the materials encountered in the area outside of the old roadway bed was eapable of maintaining a capacity of 400 cubic yards per hour and more on the instant project; but it was not readily adaptable to the removal of the heavy and large-sized material encountered in the old roadway area, as described in Finding 6.

5. Plaintiffs made an examination of the site of the project prior to making their bid and and observed the execution of the "original basin" previously, and were familiar with the materials in the areas to be exervated under the proposed contract, except the area covered by a road that extended cross thin new project. They observed this roadway but made no tests and concluded from its appearance that it was the project that the project of the proposed of the facilities in the contract as to the materials to be decided.

6. Plaintiffs commenced the work of dredging and found the materials encountered to be mud and clay with some logs, and considerable grass and weeds. On the second day, in the particular area covered by the road, and about two feet below the surface, they came upon an old roadhed, which had evidently been built many years previously and had settled, upon which the surface readway had been filled They encountered in this old subsurface road area a sheet nile dike parallel on each side of the old road, heavy piling. stringers, brickbats, and large rocks 8" to 10" in diameter. the old road having a brick walled culvert or sluice. The material in this old subsurface road was materially different from the remainder of the contract area, and choked up the pump continuously, causing the work to proceed more slowly and caused serious and material delay in plaintiffs' operations.

7. During the progress of the work, when plaintiffs experienced difficulties in dredging, plaintiffs advised the defendant's proposentatives, some of whom visited the site of the project, and the Government supervisors regularly on the project of the existing situation. This was early in the performance of the work.

 Upon plaintiffs' completion of the work on the project, the defendant, through J. E. Macdonald, Assistant District

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Director at Charleston, prepared from defendant's records and furnished to plaintiffs a statement on a yardage basis, showing total yards excavated 98,986, total pumping time 384.25 hours, rate per hour 298,7763 cubic yards, and total dredging time 334 hours 15 minutes.

Palanitifs' total time on the project was 347 hours. Three were delays of 72 hours 20 minutes, of which 45 hours 8 minutes were due to the defendant changing lines, etc. Delays and the defendant changing lines, etc. Delays are the defendant was changing hours lines and the second of the second s

No accurate measurement or survey was kept of the actual production time per hour. However, plaintifies and defendant estimated that approximately 225 hours of the total time of 334 hours 1 binutes were required to excavate in the area other than the old roadway, and that excavation was at the rate of 400 cm more cube yards per hour, and that apterior of the contract of the period of the contraction of the within the sees of the old roadway, at the rate of 50,000 cells variate per hours.

 From the record furnished by defendant, and from their own records, plaintiffs prepared their invoice or bill against the Government (erroneously dated May 28, 1987) on or about June 28, 1987, reducing the bill to an hourly rather than a yardage basis, as follows:

103.25 Hours at \$9.006 per hour 1 984.12 90.3066 cs. yds. per hr. for 103.25 hrs. 9,886 cs. yds.

Total dredged, 99,866 cubic yards.

<sup>1</sup> Reduced capacity of dredge due to digging and removal of old structures in place, rip-rap, square piling and sheet pile dike encountered in the area dredged, all of which were not described in the contract specifications.

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Reporter's flatment of the Case

10. On the same date, June 28, 1837 (the correct date),
plaintiffs rendered to defendant an additional bill based
upon the difference in the amount allowed by defendant in
its statement and the amount of rental computed at the
contract rate of \$30,00 per hour, for the full period of 334,25
hours, as follows:

W. P. A. Project #2247 Charleston, S. C.

Contract No. ER-Tps-83-947 dated March 17, 1987.

Dredging completed by dredge Cherokee and attendant plant at the numbrical Yachi Basin, Charleston, S. C. Rental period May 17, 1937, thus June 2, 1937.

Additional rental necessary on account of reduced capacity due to dredging and removal of old structures in place. Riprap, square piling, and sheet pile dikes encountered in the area dredged, all of which were not described in the contract specifications.

100.25 Hours at \$30.892 per hour \$3,374.95 Noze.—The above price per hour is based on the difference be-

twent the accepted contract restal bid price, namely \$85.90 per hour, and the rate per hour billed on our original two/oe, namely \$80.005 per hours, and the rate per hour billed on our original two/oe, namely \$80.005 per hours. The above hours are for that portion of the dredging time on which the dredge operated at reduced capacity due to obstructions efcountered during dredging operations.

These obstructions were not described or set forth in the specifications covering the contract desdring

mentions covering the contract of

The defandant rejected this claim.

II. Plaintiff bills were received in the office of John M. Anderson, State Procurement Office, contracting officer, at Columbia, Scatt Carolina, June 30, 1937, and the bill for \$8,961.02 was returned to plaintiffs for correction about July 29, 1937, received again by the contracting officer July 29, 1937, received again by the contracting officer July 29, 1937, received again by the contracting officer July 29, 1937, received again the result of the contracting officer July 29, 1937, received without the contracting officer July 29, 1937, received without profess.

12. August 30, 1937 John E. Macdonald, Assistant District Director wrote the office of the State Administrator at Columbia, attention of Mr. Hooks, and referred to a conference by them held the previous afternoon, and gave his approval of claim of plaintiffs for an additional 25 percent over and above the contract price (Art. 1 of the contract). because plaintiffs had encountered "totally unexpected and

unforeseen difficulties" in dredging out the old road.
Under date of September 1, 1937 State Director Hooks

wrote plaintiffs that the claim presented was too large and that Mr. John E. Macdonald, Assistant District Director and Mr. Hooks had agreed to approve an additional claim, but requested that plaintiffs submit a new claim to the Procurement Division covering 25 percent of the original claim, stating that it would receive the approval of Mr. Macdonald and himself.

 Plaintiffs, under date of September 4, 1987, submitted the following amended claim:

Additional rental necessary on account of reduced capacity due to dredging and removal of old structures in place, ripray, square piling and sheet pile dikes encountered in the area dredged, all of which were not described in the contract smedifications.

Norx.—The above price per hour is bused on the difference between the accepted contract rental bid price, namely \$38.00 per hour, and the rate per hour billed on our original invoke, namely \$30.00 per hour. The above hours are for that portion of the dredging time on which the dredging operated at reduced capacities on which the dredging operated at reduced capacities. These observations were not described to uperations. These observations were not described to a get forth in the specifications overring the contract the contract of the contract that the contract the contract that the contract that the contract the contract that the co

dredging.

We agree to reduce our claim by \$884.55 so as to bring
the above amount to a figure within the 25% in-

the above amount to a figure within the 25% inerease, which we understand is allowable under the existing regulations pertaining to our contract.....

14. On November 24, 1937 Mr. Anderson, State Procurement Officer, advised plaintiffs that their claim and all papers in connection therewith had been referred to the General Accounting Office, Washington, D. C.

June 4, 1938, the General Accounting Office wrote plaintiffs denying the claim for the additional amount asserted by them. 15. Except for the fold roadway, the materials in the area to be dredged were as described in the specifications. However, the substrates materials in the old roadway, as set forth in Finding 6, were wholly different and were unexpected and unknown to both parties at the time of entering period and unknown to both parties at the time of entering operation, and prevented plaintiffs from maintaining the average production of 400 cubic yards per hour.

As shown in Finding 8, the total rental time claimed by plaintiffs is 334 hours 15 minutes, which at the rate of \$39.90 per hour, the contract rate, amounts to \$13,336.77. Plaintiffs were paid \$9,961.62, leaving a balance unpaid of \$3,374.95.

The court decided that the plaintiffs were entitled to recover.

WHITAKER, Judge, delivered the opinion of the court: The plaintiffs agreed to furnish the defendant with a hydraulic dredge—

\* \* including floating pipe line, shore pipe line, necessary strendant plant and labor and material necessary for the efficient operation of the plant, in accordance with the specifications attached hersto, 280 Hours. Above equipment to be rented at the rate of \$39.90 per hour.

The controversy in the case has been narrowed to this single issue: whether or not the plaintiffs are entitled to be paid for the time their deedee and emigment, and labor

single issue: whether or not the plaintiffs are entitled to be paid for the time their dredge and equipment and labor were idle during the time the shore line was being moved by defendant's employees. The contract provided that the plaintiffs should furnish

The contract provines that the plaintness should turnish all equipment and labor, except the labor for handling the pipe line from the shore connection. The total delay during which the pipe line was being mostly defondants emulated the contract of the contractors are not as titled to be paid when they make titled to be paid while their machine was standing time only and, therefore, that the contractors are not as titled to be paid while their machine was standing that

Let it be borne in mind in the beginning that the contract was drawn by the defendant, and in cases of doubt must

Opinion of the Court be construed more strongly against it. Callahan Construc-

tion Co. v. United States, 91 C. Cls. 538.

The contract provides for rental "at the rate of \$39.90 per hour." It does not say at the rate of \$39.90 per pumping hour, and we are of the opinion that it did not mean to say

\$39.90 per numping hour. In the second paragraph of the contract, providing for guaranteed production, they speak not of hours, but of pumping hours. The plaintiffs were required to dredge 400 cubic yards "per numping hour"; whereas, in the provision

providing for rental it provides for \$39.90 "ner hour." It would further appear that the contract did not intend that the rental should be limited to numping hours, because in paragraph 3, under the heading of "Breakdown," it was provided that the contractors would be paid for the time the machine was broken down, not to exceed one hour in twentyfour (If the break-down lasted more than one hour in twenty-four, it was provided that the contractors would not

he paid for this excess.) Since express provision was made for payment while the machine was idle due to breakdowns, it is plain that it was not meant to limit the compensation to the time the machine was engaged in numping. During the time the defendant's employees were changing the shore line, the contractors' equipment was on the ground, their steam was up, their men were standing around idle,

and all other expenses were going on. It is only reasonable to assume that it was intended that the defendant should compensate them for the rental of their plant under such circumstances. The defendant says that the estimated time the equip-

ment would be needed by the defendant was 250 hours, and that the contractors were required to guarantee a production of 400 cubic yards per hour, and that the total estimated cubic vards to be dredged amounted to 100,000; and that since 400 cubic yards per hour, multiplied by the 250 hours estimated, equals the total of 100,000 cubic yards estimated to be dredged, it is to be inferred that it was intended to compensate the plaintiffs only for pumping time. We are, however, of the opinion that the considerations mentioned above are more persuasive than is this argument advanced 449973-42-CC-rel. 95 --- 29

by the defendant. The contract was drawn by the defendant; it provided for a rental of \$39.90 per hour, not per pumping hour; and it expressly provided in the case of breakdowns for payment of rental while the dredge was not pumping. We do not think it was intended to limit the rental to pumping hours; if it was, the contract failed to say so.

We are of the opinion that the plaintiffs are entitled to recover. Judgment, therefore, will be entered in favor the plaintiffs and against the defendant for the sum of \$3,374.95. It is so ordered. MADDEN, Judge: JONES, Judge: LATTLEFON, Judge: and

Whaley, Chief Justice, concur.

NORTH PACIFIC EMERGENCY EXPORT ASSO-CIATION, A CORPORATION, v. THE UNITED STATES

INo. 45190. Decided January 5, 19421

On the Proofs

Agricultural Adjustment Act; purchases of flour by the United States for shipment to Philippine Islands on export trausaction under the Act.-Where, under a Marketing Agreement between plaintiff, a non-profit organization, and its members. on the one hand, and, on the other, the United States, acting through the Secretary of Agriculture, for the disposal of the wheat surplus in 1903, entered into in accordance with the provisions of the Agricultural Adjustment Act, the plaintiff with the approval of the Secretary of Agriculture, as required by said net, sold certain shipments of flour to the United States Government, packed and sealed for shipment to and for use in the Philippine Islands; and where all the transactions by the plaintiff with the Government, in connection with which the instant claim arose, were proposed and carried out by plaintiff and its members concerned with the knowledge and consent of the Secretary of Agriculture through his authorized representatives: it is hold that said sale comes within the provisions of sections 10 (f) and 17 (a) of the Agricultural Adjustment Act defining exportations of agricultural products to include exportations to the Philippine Islands, and plaintiff is accordingly entitled to recover.

# Reporter's Statement of the Case

The Reporter's statement of the case:

Mr. Robert F. Klepinger for the plaintiff. Mr. Fred B. Rhodes, and Messrs Rhodes, Klepinger & Rhodes were on the brief.

Mr. Elihu Schott, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant. Mr. William A. Stern II, was on the brief.

Plaintiff uses to recover \$11,679,97 under a Marketing Agreement. However, and the state of the theory and the United Agreement Income as Agreement No. 14 between plaintiff, a nonprofit organization, and its members and the United States acting through the Secretary of Agriculture for the disposal of the North Pacific Wheat Surplus, which agreement was executed by plaintiff, its members, and the United States October 10, 1883, under and pursuant to the Agricultural Adjustment Act approved May 12, 1838 (48 Stat 31).

cultural Adjustment Act approved May 12, 1983 (48 Sets. 31). The question presented is whether under the agreement The question presented is whether under the agreement planniff was entitled to receive from the defendant the cifference, represented by the above-mentioned amount, between the existing and approved current matter purchase sprice of wheat four and the amount at which plaintiff, with the approval of the Secretary of Agricultura, sold the foor and Navy Departments in the Philiopine Islands.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

nent, entered specual indungs of fact as follows:

 The plaintiff is a nonprofit corporation organized and existing under the laws of the State of Oregon and having its principal place of business in Portland, Oregon.

2. Pursuant to an act of Congress approved May 12, 1933, the same being Public Act No. 10, 7ard Congress, the defendant, represented by the Hon. Henry A. Wallace, then Secretary of Agriculture, entered into a certain contract dated October 10, 1933, designated as Marketing Agreement No. 18, and entitled "Marketing Agreement for Disposal of North Pacific Wheat Surplus." A copy of this agreement (pairs Exhibit" Ay") is by reference made a part of this find-diffs Exhibit" and the properties of the property of the properties of t

Reporter's Statement of the Case ing. This agreement contained, among others, the following provisions:

Whereas, it is the declared policy of Congress, as set forth in Section 2 of the Agricultural Adjustment Act, approved May 12, 1933, as amended—

(1) To establish and maintain such balance between the production and consumption of agricultural commodities and such marketing conditions therefor, as will resetablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the purchasing power of agricultural commodities in the pre-war reprod. Annust 1909—July 1914:

(2) To approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets; and

(3) To protect the consumer's interest by readjusting farm production at such level as will not increase the percentage of the consumer's retail expenditures for agricultural commodities, or products derived therefrom, which is returned to the farmer, above the percentage which was returned to the farmer in the pre-war period August 1909-July 1914: and

Wherea, in the Pacific Northwest, compraing the States of Washington, Oregon, and Northern Idaho, due to lack of profitable foreign markets and the preduction of the profitable foreign markets and the preduction of the profitable foreign markets and the preduction of the profitable profitable profitable profitable downs of wheat test mable to obtain a fair price for said downs of wheat test mable to obtain a fair price for said the near future will be harvested and markets, and such carpitals of wheat now not only depresses the domedle market but occupies a considerable portion of the marketing of said 1938 cropy and the handling and marketing of said 1938 cropy and

Whereas, the Secretary has determined that in order to accomplish the declared policy of said Act it is necessary to bring about removal of such surplus of wheat from the depressed domestic market and that such surplus be disposed of in foreign markets, and/or to orthrough any public unemployment relief agencies; and whereas, the congestion in both the local and terminal warehouse and the depressing effect of such surplus

Reporter's Statement of the Case

upon the grain market generally, presents a critical situation for the producers of wheat in said Pacific Northwest area and has created an emergency that reouries preent action; and

Whereas, pursuant to the Agricultural Adjustment Act, the parties hereto, for the purpose of correcting the conditions now obtaining in the production of wheat in the aforeasid area and the distribution thereof, and to effectuate the declared policy of said Act, desire to enter into a marketing agreement under the provisions of

Section 8 (2) and 12 (b) of the Act; and

Whereas, the marketing and distribution of such surplus wheat are in both the current of interstate commerce and foreign commerce:

Now, therefore, in consideration of the mutual premiese herein contained, and for the sum of one dollar in hand paid to the Association and to its members, receipt of which is hereby acknowledged by the Association and its members, the parties hereto agree as follows:

SEC. 3. The Association shall serve as a clearing house for arranging details of purchasing, shipping, handling, and selling the wheat and/or flour purchased for export or otherwise as herein provided. The Association shall maintain a system of accounts which shall accurately reflect the true account and condition of all such transactions. The books, records, papers, and memoranda of the Association (and of each member thereof, in so far as such books, records, papers, and memoranda pertain to this Agreement or acts done pursuant thereto) shall, during the usual hours of business. be subject to the examination of the Secretary to assist him in the furtherance of his duties with respect to this agreement, including verification by the Secretary of the information furnished on the forms hereinafter referred to. The Association, and each member thereof. shall, from time to time, furnish information to the Secretary on and in accordance with forms to be supplied by him.

plied by him.

Szo. 4. The Secretary may, from time to time, give written instructions to the Executive Committee of the Association, on its duly appointed managing agent, divided the second of the

Reporter's Statement of the Case (a) The quantity of wheat to be so purchased, which purchases shall be made on the basis set forth in Exhibit A attached hereto and by this reference made a part

(b) The price to be paid for the same and the terms of said purchase; and

(c) The persons from whom such purchases are to be made, whether from producers, associations of producers, local or terminal warehouses, or others, It is agreed that the Association shall not have at any

one time outstanding net purchases in excess of one million bushels of wheat against which excess there are

no outstanding sales or contracts for sales.

The Association and its members hereby agree to carry out and fulfill such instructions to the best of their ability.

SEC. 5. With respect to the wheat so purchased, the Association shall receive written bids from its members. each day, for the purchase from the Association and the sale in the export trade of any part of such wheat in the form of wheat or flour. Such bids shall include the

following: (a) The amount of wheat offered to be so purchased

in the export trade as wheat or flour; (b) The Sales Prices at which such wheat and/or flour

shall be sold in the export trade and the time of shipment. The sales of the wheat, if any, shall be made on the basis of No. 2 bulk, f. o. b. ship. The sales of the flour, if any, shall be on the F. A. S. basis for steamer loading at Portland and Astoria, Oregon: and Tacoma and Seattle, Washington;

(c) The terms of such proposed sale and shipment in-cluding the C. I. F. bid and the specific deductions made in establishing the F. O. B. or F. A. S. price; and (d) The port or ports of destination of the wheat or

flour to be thus sold

Copies of all such bids shall be submitted to the Secretary, who will then advise in writing the Executive Committee, or its duly appointed managing agent which bids to accept, if any. The Association agrees to accept such specified bids and to notify those members whose bids have been thus accepted. The Association further agrees to transfer contracts for a sufficient amount of wheat, purchased pursuant to Section 4 hereof, to permit the individual members to carry out and fulfill their bids which have been accepted by the Association. The members agree to pay the purchase price for the conReporter's Statement of the Case

tracts so transferred pursuant to the terms of such contracts.

The Secretary may, from time to time, give written instructions to the Executive Committee, or its duly appointed managing agent, to sell in the export trade or to any public unemployment relief agency any part of the wheat so purchased pursuant to Section 4 hereof, in the form of wheat or flour. Such written instructions may, in the discretion of the Secretary, include any or

all of the following:

(a) The amount of wheat and/or flour to be sold: (b) The Sales prices at which such wheat and/or four shall be sold. The sales of the wheat, if any, shall be made on the basis of No. 2 bulk, f. o. b. ship. The sales of the flour, if any, shall be made on the F. A. S. basis for steamer loading at Portland and Astoria, Ore-

gon; and Tacoma and Seattle, Washington; (c) The terms of such proposed sale and shipment including the C. I. F. bids and the specific deductions made in establishing the F. O. B. or F. A. S. price;

(d) The port or ports of destination of the wheat and/or flour to be thus sold; and (e) The purchaser to whom the wheat and/or flour

shall be thus sold. The Association and its members hereby agree to carry

out and fulfill such instructions to the best of their ability. It is expressly understood and agreed that any wheat that is purchased pursuant to the written directions of

the Secretary as provided in Section 4 hereof shall not be sold except as provided in this Section 5. SEC. 7. The Association shall obtain from each member which shall have made sales, pursuant to Section 5, verified statements with respect to such sales, on forms to be supplied by the Secretary. Such statements shall include the Sales Price for all the wheat and flour sold and the cost incurred with respect to the same in accordance with the schedules set forth in Exhibits B and C. There is attached hereto, marked Exhibit B, a schedule of the cost of handling, shipping, storing, and other charges with respect to the wheat to be purchased and sold. There is also set forth in Exhibit B an item of "selling costs" to be included among the costs to be allowed in connection with each sale made pursuant to Section 5 hereof. There is attached hereto, marked

Reporter's Statement of the Case Exhibit C. a schedule of the costs of the processing of wheat into flour, handling, and packing of the same. Any provisions of the schedule in Exhibits A, B, and

C may be changed from time to time by agreement between the Association and the Secretary. The term "Purchase Price" as used in this Agreement

shall be deemed to be the price provided for in the wheat contracts purchased pursuant to Section 4 hereof and paid, pursuant to terms of such contracts, as provided in Section 5 hereof with adjustments as provided in Exhibit A.

The term "Sales Price" as used in this Agreement shall be deemed to be the F. O. B. or F. A. S. price

specified in the bid submitted in connection with any sale of the wheat and/or flour made pursuant to Section 5 hereof. The term "Net Sales Price" as used in this Agreement shall be deemed to be the Sales Price less the costs incurred (pursuant to the schedules set forth in

Exhibit B or Exhibit C) in connection with any wheat sold as wheat or flour. SEC. 8. The Association shall, if any part of the wheat, purchased is sold as either wheat and/or flour, pursuant to Section 5 hereof, present to the Secretary a verified statement, on forms to be supplied by the Secretary, showing the Purchase Price of such wheat, the Sales Price, and the Net Sales Price for such wheat and/or flour. The Secretary agrees to pay to the Association within a reasonable time of the receipt of such statement and other documents which shall indicate to the satisfaction of the Secretary that such wheat and/or flour has been exported, or otherwise disposed of pursuant to Section 5 hereof an amount count to the difference between the Purchase Price and the Net Sales Price.

3. During the year 1934, as a result of certain requisitions made by defendant's supply officers in the Philippine Islands, certain of plaintiff's members made bids and entered into contracts with the United States for the sale of flour to be delivered to the supply officers of the War and Navy Departments, f. o. b. ships, at designated ports in the United States for shipment by the defendant on other than U. S .owned ships to the Philippine Islands.

A copy of one of these contracts, typical of all the others, and the papers upon which it was made are in evidence as Reporter's Statement of the Case

plaintiff's Exhibit "B" and are by reference made a part of this finding. These contracts were made and carried out with the knowledge and approval of the Secretary of Agriculture acting for and representing the United States in and under the Marketing Agreement of October 19, 1933, supro. A. Thesenfur maintiff add flux to its members at the

under the Marketing Agreement of October 10, 1983, supra.

4. Thereafter plaintiff sold flour to its members at the price set forth in the contract with the War and Navy Departments in order to carry out the contracts, and in accepting bids by its members for the flour plaintiff had the approved of the Secretary of Agriculture, acting through his duly designated and authorized representations.

Copies of the approval and the papers on which it was granted, typical of all the contracts, are in evidence as plaintiff's Exhibit "C," which are by reference made a part of this finding.

5. The contract prices of the flour sold to the War and

Navy Departments, as outlined above, for shipment to the Philippine Islands were less than the current continental United States market prices for the wheat. As a result of these sales during 1984, the defendant, esting by and through the Sevetary of Agriculture, paid plaintif on March 23, 1985, 81,107-295, computed under and in secondance with 1985, 81,107-295, computed under and in secondance with an experiment of the secondary of the secondary of the amount represented the difference between the current marter purchase prices for the wheat purchased by plaintiff and sold in the form of flour and the prices paid by defendant with therefore March 8, 1334, and thereafter during that years with therefore March 8, 1334, and thereafter during that years

and therefor March 8, 1934, and thereafter during that year under the contracts mentioned in findings 3 and 4.6 to 6. Prior to May 30, 1937, the plaintiff became entitled to 6. Prior to May 30, 1937, the plaintiff became entitled to 70 cm<sup>2</sup> to 1937, the plaintiff became entitled to an of a lee of grain or flour made pursuant to the terms of the Markeling Agreement and only approved by the Secrtary of Agriculture, or by his designated and duly authorized representative, the sum of \$18,947,776, less certain proper and authorized defections about which there were no dispress, amounting to \$8,916.07, or as the same of \$23,262.08. Shortly prior to May 20, 1957, G. Fr. Allen, chief disbursing partners of Archivolators, and the same of \$23,262.08. the General Accounts Office for pressult and approval this disbursement with a further deduction and offset in favor of the United States against the amount otherwise shown to be due by plaintiff of \$11,679.27 theretofore paid plaintiff under the Marketing Agreement by reason of asks plaintiff under the Marketing Agreement by reason of also not balance in favor of plaintiff of \$882,70 intented of \$22,200.000.

The General Accounting Office approved this offset in its presudit, and on May 20, 1937, the said disbursing officer of the Agricultural Adjustment Administration at San Francisco prepared a schedule of disbursements showing the deductions, which included the \$11,679.97, totaling \$18,595.04, as "counter-adjustments" from the total amount due plaintiff of \$19.477.76, and the balance of \$882.72 so arrived at was paid, accompanied by a statement from the chief disbursing officer as follows: "This office has been advised that such sales [sales of flour to the United States in 1934, as hereinbefore detailed | lack the essential characteristics of a 'sale in the export trade,' and that no indemnities could properly be paid under the [marketing] agreement with respect to such sales. Therefore, an offset in the amount of \$11.679.97 is being made against the otherwise approved amount of a claim presented by you."

Thereupon the plaintiff submitted to the Secretary of Agriculture a claim for the amount of \$11,0790 ft deduced by the disbursing officer, and the Secretary of Agriculture at the request of plaintiff sont the claim to the Comptroller in an opinion contained in a letter to the plaintiff sathe September 16, 1988, held that the payment of the \$11,0790 ft in 1994 was illegal, as not being authorized by the Marketting Agreement, and that the offists was proper, and dislatlowed Agreement, and that the offists was proper, and dislatlowed as well as the second of the second of the second of the action of the second of the second of the second of the action of the second of the second of the second of the action of the second of

Copies of the "Schedule of Disbursements" of May 20, 1937, plaintiff's Exhibit D, and of the opinions of the Comptroller General, plaintiff's Exhibits E and F, respectively, are by reference made a part of this finding. 480

Reporter's Statement of the Case

The opinion of the Comptroller General of September 16.

The opinion of the Comptroller General of September 16, 1988, was as follows:

Your claim No. 0477700 in the amount of \$11,679.87 representing refund of amounts deducted from voucher No. 19-79868 of the June 1987 account of G. F. Allen, as differential payment of flour furnished the War and Navy Department under various contracts for export to the Philippine Islands, has been carefully examined

and it is found that no part thereof may be allowed for the reasons hereinafter stated. Marketing Agreement No. 14 executed by the Secretary of Agriculture on October 10, 1933, provided in part for the removal of surplus wheat from the depressed domestic market, its export and disposal in foreign markets and for payment of a differential of the net purchase price against the wheat supplied in such sales and the sale price of the flour. It was further provided that the North Pacific Emergency Export Association and its members should purchase surplus 1932 crop wheat at prices to be prescribed by the Secretary of Agriculture (Section 4), and sell such wheat, or flour processed therefrom in the export trade or to any public unemployment agency designated by the Secretary of Agriculture (Section 5), at prices acceptable to the Secretary and it was expressly understood and agreed that any wheat purchased pursuant to instructions of the Secretary as provided in section 4 should not be sold except as provided in section 5. Upon purchase of such wheat and sale of the wheat, or flour processed therefrom, in strict accordance with the agreement the association was to be paid for the benefit of participating members certain differentials between the purchase

and tale prices in accordance with schedules of forth in and made parts of the agreement, form 1920 when to the Army and Navy were not usice either in the expert trade or to public unemployment relief agencies, the property trade or to public unemployment relief agencies, making the association or its members to differential payments under add agreement. The Army and Navy of another under add agreement. The Army and Navy of and by reason of their ramifications and far-fining operations are substantial and presumably valuable domestic and the contract of the army and the contract of the army and the property of the

marked and intended for shipment to and use in the Philippine fainted or elsewhere of our rot change he Philippine fainted or elsewhere the or rot change he partments either tradem or exporters. Their purchases in this country whatever their ultimate desination, nor the contract of the contract of the contract of the agencies of the Government and the sales to them cannot be reasonably regarded as alse in the export trade were not in conformity with the agreement, but would appear to have been in contravelation of insterns and paper to have been in contravelation of insterns and contraction of the contract of the contract of the contraction of the contract of the contract of the contraction of the

ably processed from the wheat of the 1933 crop.

From the facts presented there is no legal basis for
payment of any amount as differential under the agreement in addition to the contract price.

I therefore certify that no balance is found due you from the United States.

7. Plaintiff made written request to the Comptroller Gen-

eral to review the disullowance of September 16, which he did, and in a letter to plaintiff of June 16, 1989, he discussed the matter in considerable detail and concluded that  $v^* = v$  in view of the unambiguous and unequivocal limitations of the Marketing Agreement, there is no legal basis for the payment of the claim, and the disullowance of September 16, 1983 must be and is sustained."

8. Throughout the period of the transactions between the United States and the plaintil, a hereinlefores set forth, and at all times after they verse finally consumnated and supprent was made in connection therewith, the United and the plaintiff interpreted such transactions as coming within and being covered by the terms and provisions of the Marketing Agreement of October 10, 1953. The Secretary of Agriculture has at no time made any decision to the

June 29, 1934, the office of the General Counsel of the Agricultural Adjustment Administration of the Department of Agriculture by the assistant general counsel gave an opinion to the Grain Section of the Agricultural Adjustment Administration of the Department, as follows: Opinion of the Court

(a) The North Pacific Emergency Export Association has the power to approve the sale of float to the United States Army against proof that such flour is for foreign domaination. Such as asic is one which may plus of wheat from the depressed domestic market \* \* \* aper the terms and conditions of the Marketing Agreement. It would appear that a foreign (b) The sale of wheat or flour for communition in

the Philippine Islands is correctly classified as a sale looking to a "Foreign" market. \* \* \*

The court decided that the plaintiff was entitled to recover.

Lerrarcox, Judge, delivered the opinion of the court:
The solution of the question involved in this case as to
the right of plaintiff to be paid by the defendant the
amount of \$11,679.97 must be governed by the substance
of the arrangements and transactions between plaintiff and
the Government and the intentions of the plaintiff and the
United States as evidenced by the Markening Agreement of
Cocker 10, 1050, the Act of May 1, 1050, and the facts and
States, packed and seeded, for shipment to and use in the
Philitopine Lolands.

The pertinent facts concerning the agreements and transactions between plaintiff and the defendant which give rise to the claim presented in this suit are set forth in considerable detail in the findings. At the outset it should be stated that the Marketing Agreement of October 10, 1933. provided that the Secretary of Agriculture might, by written designation, appoint any officer or employee of the Department of Agriculture, or any person or persons, to act as his duly authorized representative in connection with any of the provisions contained in that agreement to be performed by the Secretary. All the transactions by plaintiff with the Government, in connection with which the claim here involved arose, were proposed and carried out by plaintiff and its members concerned with the knowledge and approval of the Secretary of Agriculture through his duly designated and authorized representative, or representatives.

Onlinion of the Court The plaintiff association was located at Portland, Oregon, and its territory covered the states of Washington, Oregon, and Northern Idaho: its business was that of dealing in and disposing of wheat and flour from the 1932 crop surplus estimated at about 25,000,000 bushels. The membership of plaintiff was limited to producers or an association of producers of wheat or flour in the territory mentioned and membership in the association was subject to approval of the Secretary of Agriculture. The operations and business transactions of plaintiff and its members were conducted by an executive committee of nine members and were subject to the written approval of the Secretary, one of the members of the committee being a duly designated and authorized representative of the Secretary of Asriculture. Subject to and with the approval of the Secretary, the executive committee was authorized to appoint a managing agent to act for the association subject to directions of the executive committee, and any and all actions taken by the managing agent, the executive committee, or by the association had to have the approval of the Secretary of Agriculture or his duly authorized representative. All such acts and transactions were so approved and the plaintiff and its members conformed to and strictly complied with these requirements of the Marketing Agreement.

Section 3 of the Marketing Agreement provided that the association should serve as a clearing house for arranging details of purchasing, shipping, handling, and selling wheat and/or flour purchased for export.

Section 4 of the Marksting Agreement provided for the giving by the Secntary from time to time of written instructions to the executive committee or its managing agent produced in the Pecific Northwest area, above mentioned, for the purpose therein provided, which instructions included, among others, the price to be paid by plaintiff for the whest and the terms of the purchases. It was further provided that purchases in across of 1,000,000 bushes of wheat against which across there were no outstanding sales or contracts for sale, and plaintiff and its members agreed or contracts for sale, and plaintiff and its members agreed Opinion of the Court

to carry out and fulfill all instructions of the Secretary of

Agriculture to the best of their ability. Section 5 of the Marketing Agreement provided that with respect to the wheat so purchased under instructions from the Secretary, as provided in section 4, the plaintiff "shall receive written bids from its members, each day, for the purchase from the Association and the sale in the export trade of any part of such wheat in the form of wheat or flour. Such hids shall include the following: (a) The amount of wheat offered to be so purchased in the export trade as wheat or flour: (b) The Sales Prices at which such wheat and/or flour shall be sold in the export trade and the time of shipment. The sales of the wheat, if any, shall be made on the basis of No. 2 bulk, f. o. b. ship. The sales of the flour, if any, shall be on the F. A. S. basis for steamer loading at Portland and Astoria, Oregon, and Tacoma and Seattle, Washington: (c) The terms of such proposed sale and shipment including the C. I. F. bid and the specific deductions made in establishing the F. O. B. or F. A. S. price; and (d) The port or ports of destination of the wheat or flour to be thus sold."

Section 5 of the Marketing Agreement further provided and required that copies of all such bids received by plaintiff association from any of its members must be submitted to the Secretary "who will then advise in writing the executive committee, or its duly appointed managing agent which bids to accept, if any." Plaintiff agreed to accept only such bids as were approved by the Secretary and to notify those of its members whose bids had been thus accepted. Plaintiff further agreed, and was required after approval of the transaction by the Secretary, to transfer contracts for a sufficient amount of wheat purchased pursuant to section 4 of the agreement to permit the individual member or memhers whose hids had been approved and accepted to carry out and fulfill their bids. It was further expressly understood and agreed by plaintiff, its members and the Government that any wheat purchased by plaintiff pursuant to the written directions of the Secretary, as provided in section 4, "shall not be sold except as provided in section 5." Section 7 of the Marketing Agreement required plaintiff

Opinion of the Court to obtain from each of its members, who had made sales pursuant to section 5, verified statements with respect to such sales on forms furnished by the Secretary; that such statements should include the sales price for all the wheat and flour sold and the cost incurred with respect to the same in accordance with schedules B and C of the Marketing Agreement. The term "purchase price" was defined by the Marketing Agreement to be the price provided for in the wheat contracts purchased pursuant to section 4 and paid pursuant to the terms of such contracts, as provided in section 5, with adjustments as provided in schedule A. The term "net sales price" was defined by the agreement to be the sales price of wheat or flour less the costs incurred pursuant to schedules B or C in connection with any wheat sold as wheat or flour.

Section 8 provided that as to any part of the wheat purchased and sold either as wheat or flour, pursuant to section 6, the plaintiff should present to the Secretary a verified attenent, on forms to be supplied by the Secretary, a thouing the purchase price of such wheat, the sales price, and the purchase price of such wheat, the sales price, and further provided that "The Secretary agrees." Day to the Association within a reasonable time of the receipt of such attenment and other documents which shall indicate to the satisfaction of the Secretary that such wheat and/or flour has been exported, or otherwise disposed of pursuant to Section 5 hereof an amount equal to the difference between the Furchase Price and the Net Sets Price."

Section 9 of the Markoting Agreement provided that "out of the funds than paid to plainfill" by the United States through the Secretary of Agriculture, the plainfill should remularisate life of the cost which it incurred over and above contracts to its members and pay to those members of whom contracts to its members and pay to those members to whom the contracted wheat had been transferred by plaintiff, pursuant to section 5, an amount equal to the difference between the purchase price which such members had paid for the contracted wheat and the net sales price received in commention with the sale and delivery of such wheat or

430 Quinion of the Court

While the Marketing Agreement containing the provisions above discussed was in effect, and during the months of February, March, July, and August 1984, the supply officers of the U. S. Army and Navy at Cavite, Philippine Islands, in charge of the acquisition of supplies for use thereat, prepared and sent requisitions for certain quantities of flour to the appropriate supply officers of the Army and Navy in the western portion of the United States. For the purpose of this case we will discuss only the requisition of February 13, 1934, of the Naval Supply Officer at Cavite, P. L. for the purchase and shipment of 200,000 pounds of flour (see finding 4). This requisition was received by the Naval Supply Officer at Puget Sound Navy Yard, Bremerton, Washington, who thereafter, in the purchase and shipment of flour, acted for the United States as contracting officer and for the Naval Suply Officer at the Navy Yard at Cavite, Philippine Islands. In this transaction the United States acted through J. F. Hatch, captain, Supply Officer, U. S. N. Circular letters were sent by the Government through its supply officer to members of plaintiff association for bids for the quantity of flour desired to be packed and sealed in 50-pound tins to be delivered f. o. b. Wharf, Terminal #4, Portland, Oregon, and to be shipped under Government Bill-of-Lading to the Supply Officer, Navy Yard, Cavite, P. I. The Terminal Flour Mills Company at Portland, Oregon, a member of plaintiff association and a party to the Marketing Agreement of October 10, 1933, submitted to the Government an offer to furnish and deliver f. o. b. Portland the 200,000 pounds of flour from the 1932 wheat-crop surplus at a certain price per pound. The bid as prepared and submitted by The Ter-

Opinion of the Court minal Flour Mills Company was regarded by plaintiff as a transaction under and in accordance with the Marketing Agreement with the United States, and the making of the bid, the resulting contract and the consummation of the transaction were ratified and approved by the Secretary of Agriculture. The unit price for the flour called for was 0.0319 a pound, or a total amount of \$6,380. This was less than the current continental United States market price as fixed by the United States through the Secretary of Agriculture for wheat contracted for by plaintiff for nurchase. and from whom The Terminal Flour Mills Company was required to acquire and did acquire wheat for the production of flour to be sold and delivered at the price for which plaintiff had contracted for it. The difference in this instance between the purchase price of wheat and the net sales price of the flour produced therefrom, packed and delivered for shipment to the Philippine Islands as defined by sections 4, 5, and 7 of the Marketing Agreement, above described, was \$1,384.12. Other like instances, three in number, produced excess net sales prices over purchase prices of wheat, which, when added to the excess of \$1,384.12, just mentioned, totals \$11,679.97 now sought to be recovered by plaintiff in the instant case.

The United States, acting through Captain Hatch, its supply officer at Bremerton, made an award to The Terminal Flour Mills Company, a member of plaintiff association, for the 200,000 pounds of flour for \$6,380. This award was made February 21, 1934, and on or about the same date the standard form of Government contract for supplies was executed by the United States and The Terminal Flour Mills Company for the 200,000 pounds of flour under the terms and conditions above-mentioned. The flour was delivered to the defendant, packed and sealed, f. o. b. Portland. and was shipped March 8, 1934, on the S. S. California, of the States Steamship Line, consigned to the Supply Officer of the Navy Yard at Cavite, P. I. On the same date, plaintiff was paid by the defendant \$6,380 specified in the supply contract with the Government represented by its supply officer at Bremerton, Washington, and, on March 23, 1934, upon the necessary documents prepared and approved by the Secretary of Agriculture disclosing all the details of the transaction as called for and required under the Marketing Agreement of October 10, 1038, companied by a voucher for \$1,384.12 approved by the Secretary of Agriculture and the Comprobler of the Department of Agriculture, plaintiff was paid the amount of \$1,384.12 by A. O. Walsh, Major, data March 20, 1386 on the Transary of the United States. The certificate of the Secretary of Agriculture by the Composite of the Secretary of Agriculture was as follows:

I certify that! I have verified the transactions within exmansion, and as a destrible detail on from attached; that said carbon is the said exclusion were in accordance with terms of the contracts approved by the Secretary of Agriculture; that the transactions listed are in accordance with the agreement noted herein (Markeing Agreement Series, Agreement 19) and that verification threefolds are in accordance with the agreement and the verification threefolds are in a similar and a similar and the sack accordance and the sack and a similar and the sack and the present to section 3 of said agreement, and this voucher is hereby approved for payment in the amount of \$1,948-112.

Thus the matter stood for a little more than three years when, on May 20, 1937, G. F. Allen, chief disbursing officer of the Agricultural Adjustment Administration. Department of Agriculture, at San Francisco, California, prepared a schedule of dishursements on which was shown an amount of \$19,477,76 admittedly due plaintiff under the Marketing Agreement in connection with transactions, about which there was no dispute, and a deduction therefrom in the amount of \$11.679.97 theretofore in 1934, approved by the Secretary of Agriculture and paid to plaintiff on account of the transactions hereinbefore described, carried out and concluded under the terms of the Marketing Agreement. Other counter-adjustments, about which there were no disputes, were also made on this schedule, all of which totalled \$18.595.04, leaving a balance of \$882.72, which was paid. This schedule of disbursement was transmitted before pavment to the General Accounting Office for presudit and was approved. This was done without the knowledge of

Opinion of the Court the plaintiff. The disbursing officer, when making payment of the amount of \$882.72, attached to the disbursement

schedule sent to plaintiff a statement that "This office has been advised that such sales (in connection with which the \$11,679.97 had been paid) lack the essential characteristics of a 'sale in the export trade' and that no indemnities could properly be paid under the agreement with respect to such sales."

The United States, acting through the Secretary of Agriculture, has not at any time decided that the transactions and sales hereinbefore described and referred to in the schedule of the disbursing officer above-mentioned did not come within and were not covered by the Marketing Agreement of October 10, 1988, or that the amount of \$11,679.97 paid thereunder to plaintiff by his direction could not properly be paid under the Marketing Agreement with respect to such sales. On June 29, 1934, the office of general counsel of the Agricultural Adjustment Administration, Departs ment of Agriculture, considered an inquiry from the Grain Section with reference to transactions of the character hereinbefore described and, on that date, in an opinion by the assistant general counsel written to the Grain Section of the Agricultural Adjustment Administration, it was stated: "To give answer to your inquiry of June 26, the undersigned is of the opinion that (a) The North Pacific Emergency Export Association has the power to approve the sale of flour to the U. S. Army against proof that such flour is for foreign destination. Such a sale is one which may fairly be said to look to 'the removal of \* \* \* surplus of wheat from the depressed domestic market \* \* \* \* as per the terms and conditions of the Marketing Agreement, It would appear that a foreign market is any market other than the domestic market; (b) the sale of wheat or flour for consumption in the Philippine Islands is correctly classified as a sale looking to a 'foreign' market."

On September 16, 1938, and again on June 16, 1989, the General Accounting Office, in opinions sent to plaintiff, held that the "unambiguous and unequivocal limitations of the Marketing Agreement" of October 10, 1933, showed that the

Opinion of the Court sales and the transactions in connection with which the United States, by direction of the Secretary of Agriculture, had paid plaintiff \$11,679.97 were not covered and did not come within the terms of the Marketing Agreement, and that there was no legal basis for payment of the amount. The theory upon which the General Accounting Office based this conclusion, as the opinions show, was a technical interpretation of the terms "domestic transactions," "export trade," "trade or trader"; upon that interpretation it was held in substance that the Marketing Agreement did not apply and could not be held to apply to transactions of the character involved with the United States; that any purchase by the United States was entirely a domestic transaction and could not be regarded as looking to a "foreign" market: that the United States was not engaged in trade or as a trader and that no purchase by it, even though for shipment and use at a point defined by the statute, which was a part of the Marketing Agreement, and under which the agreement was made, could be regarded as a sale in the

"export trade." We are of opinion from all the facts and circumstances disclosed by the record, the relationship of the parties, the character of the transactions and the intention of the norties. as clearly evidenced by the practical construction which they placed upon the agreement between them, that the contemporaneous interpretation and view taken by the Secretary of Agriculture and the view of the Assistant General Counsel of the Agricultural Adjustment Administration were correct and that the conclusion of the General Accounting Office was erroneous. The practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed by the courts to be of great, if not controlling, influence. Baltimore v. Baltimore and Ohio Railroad Co., 10 Wall, 543: Brooklyn Insurance Co. of New York v. Dutcher, 95 U. S. 969; Old Colony Trust Co. v. City of Omaha, 230 U. S. 100. The meaning of the contracting parties is the contract. Whitney v. Woman, 101 U. S. 399. The intent of the parties prevails whenever it can be asopinion of the Carri certained. George v. Tate, 102 U. S. 564. There cannot be any doubt in this case as to what the parties meant and what they intended; that is conclusively proved by their acts and conduct, with full knowledge of the facts.

The technical meaning of the terms above referred to and discussed in the opinion of the General Accounting Office, and here relied upon by counsel for the defendant, does not in the circumstances disclosed help the defendant's case or hinder the plaintiff's claim. Actually and as a practical matter the transactions constituted exportations of flour. as exportations were defined in the statute and intended under the Marketing Agreement as it was contemporaneously interpreted and applied by the plaintiff and the United States. The United States got the flour which was purchased for shipment to the Philippine Islands for an amount, including the amount here involved, which did not exceed but only equaled the current market price. This price the United States would have had to pay, and perhaps more, as profit, had the flour been obtained independently of the Marketing Agreement. A designated representative of the Secretary of Agriculture was an active member of the controlling executive committee of the plaintiff association; its managing officer was appointed with the approval of the Secretary and was subject to the direction of the Secretary; and all the acts and transactions of plaintiff association and its members under the Marketing Agreement were subject to the direction and control of the United States through the Secretary of Agriculture. Nothing that was done was illegal in the sense that it was prohibited or that the Secretary of Agriculture, acting for and on behalf of the United States, exceeded the scope of his authority. Judgment will be entered in favor of plaintiff for \$11,-

679.97. It is so ordered.

Madden, Judge; Jones, Judge; Whitaker, Judge; and Whaley, Chief Justice, concur.

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Reporter's Statement of the Case

# MASTERBILT PRODUCTS CORPORATION v. THE UNITED STATES

INo. 44957. Decided January 5, 19421

On the Proofs

Reine far, instandate excensive.—Where the plantiff sold and delivered ejacute thinkvas and dispuss, which were sensitive included extra the sensitive properties. It platfue, and electman and the sensitive properties of the properties of a mismake benefit for the pursons of being thirdent on the stretting port of an automobile; and where and device was networked as a native platfue which would realish a manifest was not been a surface platfue when the sensitive of the sensitive properties of the sensitive properties of the sensitive properties of equal from the rouli; it is left that the device, individually the total of its basic mechanics, was primarily adapted for our intion of its basic mechanics, was primarily adapted for our intercedingly it was tanable as in automobile account great accordingly it was tanable as in automobile account great.

accordingly It was braidle as an automobile accessory under the provisions of section 600 (c) of the Revenue Act of 1842. Some,—articles primarily adopted for use in motor reluction to be regarded as parts or accessories of such rehicles, even though there has been some other use of the articles for which they are not so well adapted. Universel Battery Co. v. United States. 231 11. 8, 180, 180.

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The Reporter's statement of the case: Mr. Henry Wood for the plaintiff.

Mr. Joseph H. Sheppard, with whom was Mr. Assistant Attorney General Samuel O. Clark, Jr., for the defendant. Mesers. Robert N. Anderson and Fred K. Dyar were on the brief.

The court made special findings of fact as follows:

1. The plaintiff is a corporation organized under the laws of the State of New York and having its place of business in the City, County, and State of New York.

2. The plaintiff, during the twelve months of June 1985 to June 1936, sold and delivered 120,000 cigarette lighters and dispensers for automobiles at the price of \$0.84\(\pext{4}\) per

lighter. These cigaretic lighters and dispensers were mechanical devices for automatically segregating, lighting mechanical devices for automatically segregating, lighting the control of the container, a cigarette is automatically segregated and signed with the heating element contained therwin, lighting the cigaretes ready for use. An electric current is required with the cigaretes ready for use and element contained therwin, lighting the cigaretes ready for use. An electric current is required be supplied from a battery such as is used in connection with an automobile or other source; but if the ordinary house current is used at the source of supply, it is necessary to use either a transformer or a resistor or some similar device, otherwise the current would be too strong for the purpose otherwise the current would be too strong for the purpose otherwise the current would be too strong for the purpose

So objectively and the state of the state of

The lighters and dispensers so sold by plaintiff were not essential to the operation of the vehicles to which it was intended they should be attached, but they were intended to be used in connection with the operation of automobiles and this was their primary use.

4. When affixed to an automobile in the manner set forth above, the device enabled a smoker who was driving the car to obtain a lighted eigarette without taking his eyes off of the road and the device was advertised by plaintiff as an automobile safety device.

No excise returns were made and no excise taxes were paid on the sales of the lighters and dispensers referred to above.

 The Collector of Internal Revenue assessed the tax in the amount of \$2,124.67 on the sale of said lighters as taxable under Section 606 (c) of the Revenue Act of 1932 as ex451 Opinion of the Court

tended. The plaintiff, in August 1938, paid the tax in full with interest thereon in the amount of \$2,440.84.

September 8, 1939, plaintiff filed a claim for refund of the taxes so paid on the ground that the cigarette lighters and dispensers were not parts or accessories of automobiles but were adapted for use also on house models, ash receivers.

etc.
7. On May 2, 1939, the Commissioner of Internal Revenue rejected the plaintiff's claim.

The court decided that the plaintiff was not entitled to

recover.

Opinion per curians: The evidence shows that the plaintiff during the period involved in the case sold and delivered to Brown and Williamson Teleasco Gooprostics 102,000 eigenetes lighters and dispensers for automobiles. These eigenetal lighters and dispensers were mechanical devices for greated lighters and dispensers were mechanical devices for greated to the second of the period of the propose of the period of the perio

used other than on automobiles.

These lighters and dispensers so sold by plaintiff were intended to be used in connection with the operation of automobiles and this was their primary use but they were not essential to the operation of the which is to which it was therefore the operation of the which to which it was therefore the operation of the which to which it was therefore the operation of the operation of

The Collector of Internal Revenue assessed a tax on the sale of these lighters under Section 606 (c) of the Revenue

Act of 1902 as extended (47 Stat. 1902, 202; 48 Stat. 690, 603). The plantiff paid the tax so assessed together with interest paid to the state of t

The Supreme Court in the case of Universal Battery Co. v. The United States, 231 U. S. 580, 584, prescribed a rule for determining what devices were subject to tax. This rule was as follows:

• • • It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted.

The findings show that the device sold was primarily adapted for use in motor vehicles; that it was so intended to be used, and that it was advertised as a safety device in the operation of automobiles which enabled the operator of a car to obtain a lighted cigarette without taking his aves from the read.

The evidence shows that the device could be made to work when attached to a table, deak, or ash receiver but it could not be so operated under the ordinary house current and no suggestion is made as to how any advantage could be gained except when used in connection with an automobile. We think it is quite plain that the tax was properly imposed under all of the court decisions.

Plaintiff's petition must be dismissed and it is so ordered.

#### Opinion of the Court

### JAMES CARLISLE BASKIN v. THE UNITED STATES

# (No. 45522. Decided January 5, 1942)\* On Defendant's Motion to Dismiss

On Defendant's Motion to Dismis

BRMA to me for safety where employment was termeduced on cheepen.—Where it is shown by the pertition that plaintill's emchanged to the pertition of the plaintill's ememperated and later consideredly terminated upon written during which, so for a that position was encourant, were new reasons as the pertition of the pertition of the pertition of the entitied that he would be no rescored, at the salary for which he brings until it is add that the section of the proper Govregulations of the Civil Service Commission, and in sectionples to review by the Court of Claims, Burney v. Ontside heart to review by the Court of Claims, Burney v. Ontside

Some; soldier hosorably discharged.—The fact that plaintiff in the instant cuse was an honorably discharged soldier does not affect the decision. Keim v. United States, 177 U. S. 200, and Medkirk v. Tmited States, 44 C. Cla. 496, cited.

Same.—Where the Director of Prissus agreed that if plaintiff, then
under suppression, would make application for leave without
pay, in order that he might apply for transfer to some other
Government position; and where such agreement was carried
out and such application for transfer was made; it is sheld that
this did not give plaintiff the right to demand the position from
which he had been enconvole or the sur thereof.

Mr. Edgar Turlington for plaintiff. Mesers. Robert & McInnis were on the brief.

Mr. Mortimer B. Wolf, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant.

The facts sufficiently appear from the opinion of the court.

LITTLETON, Judge, delivered the opinion of the court: Plaintiff brought this suit August 1, 1941, to recover \$8,845 as salary at the rate of \$1,680 per annum from January 15, 1995, less \$2,605 earned in private employment subsecuent to that date.

<sup>\*</sup>Certionart denied April 27, 1942.

Opinion of the Court Plaintiff is a citizen and resident of Bishopville, South Carolina. He served in the United States Army as a first lieutenant from August 31, 1917, to June 18, 1919, when he was honorably discharged. From March 1, 1928, he was employed in the United States Prison Service, Department of Justice, under the Warden of the U. S. Penitentiary at Lewisburg, Pennsylvania, having been appointed to that service and duly qualified after examination, in accordance with the regulations of the Civil Service Commission. He was a classified employee in the Civil Service and, as such, was entitled to the protection of the provisions of section 6 of the Act of August 24, 1912, Title 5, U. S. Code, section 652, which provides that no person in the classified service shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of same and of any charges preferred against him, and be furnished with a copy thereof, and shall also be allowed reasonable time for personally answering the same in writing. As an honorably discharged soldier he was entitled to the benefits provided for in section 648, Title 5, U. S. Code, which provides that in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or be reduced in rank or salary.

While serving as a guard in the Bureau of Prisons at the U. S. Pnincitary at Levishery, Pennsylvania, plaintiff received on September 3, 1903, a formal written notice of supersion from the Warden of the institution. This notice was given by the Warden under and in pursuance of the patest by the Commission in conformity with section 502, Title 5, U. S. Code. The charge upon which plaintiff was suspended from his position as guard was based upon alleged misconduct by reason of his "having written letters of the conformal properties of the total properties of the properties of the conformal properties of the charge stating, in substance, that the letters mustioned in the notice of suspension were written by him

Opinion of the Court properly and in good faith and that the writing of such letters was not a violation of Civil Service Commission Rule XII. After receipt of plaintiff's reply to the formal written charge given him, upon the basis of which he was suspended, the suspension of plaintiff from his position in the Prison Service was continued and plaintiff was never permitted to resume his duties as a quard in the Prison Service. either at the U. S. Penitentiary at Lewisburg, Pennsylvania. or elsewhere. No formal hearing at which the plaintiff was present was had upon the written charge theretofore furnished him, but it is not alleged that plaintiff requested a hearing or that he was denied an opportunity to be heard

Plaintiff took no further steps in the matter until October 4, 1935, when he wrote a letter to the Director of the Bureau of Prisons expressing his regret of the mistake he had made in writing the letters criticizing the U. S. Prison administration. On October 8, 1935, he received a reply from the Assistant Director of the Bureau of Prisons which stated in part as follows:

before the proper official, or officials,

The Director has authorized me to say that he accepts your explanation of the transaction which resulted in your present suspension, and that in connection with your efforts to secure a transfer he is willing to give you the best letter of recommendation he could consistently issue. I am enclosing a draft of the letter of recommendation he would be willing to give you,

If you will send us your application for leave without pay, we will arrange to terminate your suspension, with the understanding that while you will be officially a part of the Prison Service, you do not report back for duty at Lewisburg but retain the status of an employee on leave without pay pending your efforts to secure a transfer to some other branch of the service.

The "letter of recommendation," a draft of which was sent to plaintiff with the above-quoted letter of October 8, was subsequently signed by the Director of Prisons, and contained the following statement in regard to plaintiff:

This employee was appointed at the U. S. Industrial Reformatory at Chillicothe, Ohio, March 1, 1928. Under date of August 7, 1929, he was transferred to the U. S. Penitentiary, Atlants, Ga. From the latter institution be was transferred April 1, 1809, to the New Prison Camp opened near Fayetteeville, N. C. He was then transferred to saist in opening the new camps when the transferred to saist in opening the new camps model to the position of Lintenant at Peterburg Va., December 22, 1809, but at his request was transferred back to Fort Bragg, July 4, 1801, resuming the status of gazard. When the Camp at Fore Bragg was discontinued he was transferred, December 12, 1938, to the new Northeastern Peritinutary and Leedsburg, Fa.

During this period of employment he has rendered faithful, conscientious service. Reports from his superior officers show him to be a competent employee.

Plaintiff accepted the conditions set forth in the Director's letter of October 8, 1938, and on October 11, 1938, applied for leave without pay; upon receipt of plaintiff letter the Director granted the applications and on October 19, 1938, plaintiff received from the Director of the Bureau of Prisons, through the Assistant Director, a letter confirming the arrangement and enclosing a copy of a letter of October 17, 1936, from the Director to the Warden of the Levisburg Penitentiary with respect to the termination of plaintiffs service at that inclution and termination of the plaintiff of the Property of the Western and Pr

Thereafter plaintiff made effects to obtain a position in some other branch of the Government service to which he could be transferred under the arrangement hereinbefore stated, but without success. Thereafter, at some date not alleged, plaintiff sought veinstatement to his former position as a prison guard, but without success. Thereafter, at some time not alleged, the plaintiff consulted legal conneal, and his comment made a request to the Director of Prisons and his comment made a request to the Director of Prisons with the prison of the prison of Prisons of Prisons in which the Director of the Bureau of Prisons in which the Director stated in part that plaintiffs "time is up now, and his appointment is, therefore, being terminated for the good of the service."

In September 1937, about one year and sight months after receipt of the Director's latter of January 15, 1936, plaintiff, on advise of his counsel, instituted suit in the District Court of the United States for the Eastern District of South Carolina for salary as a Civil Service employes of South Carolina for salary as a Civil Service mipoles of South Carolina for salary as a new solution of the said for lates of principle of the said for lates of principle of the said for lates of principle on most embleviation and that nothing in that paragraph should be construed as giving the District Court jurisdiction of cases brought of the control of the said for lates of the said f

about one year and four months later.

The salary of the position of guard at the Lewisburg Penitentiary which plaintiff was receiving up to the time his employment in the Prison Service was suspended September 3, 1935, and the rate of pay attaching to such position of guard since that time, has been and is \$1,690 a year.

Between January 15, 1936, and August 1, 1941, the date of filing of the petition herein, plaintiff has earned and received \$2,605 from private employment.

From the foreign statement of first, which are those set forth in the petition, we are of opinion that plaintiff has not stated a cause of action entitling him to recover salary as prion guard. The facts show that plaintiff employment in the Federal Service as a prion guard at Levelstage, Remytonia, was first supposed September 8. Levelstage, Temptonia, was first supposed September 8. Director of the Bureau of Prisons on October 17, 1935, upon the written charges made which, as far as that position was concerned, were never vacated or set saide and plaintiff was never rendered to or advised that he would be restroyed to that position at the salary for which he officiality was in accordance with the status (see, 602, U.S. Code, supra) and the regulations of the Civil Service Commission, and is not subject to review here. Burnap v. United States, 285 U. S. 512, 518-502; Norris v. United States, 287 U. S. 77, 81, 82; Medkirk v. United States, 44 C. Cls. 469, 481; Panaglay V. Inited States, 44 C. Cls. 469,

481: Ruggles v. United States, 45 C. Cls. 86, 89. The subsequent arrangement between the Director of the Bureau of Prisons and plaintiff, which existed from about October 8, 1935, to January 15, 1936, to the effect that if plaintiff would make application for leave without pay his suspension from Government service, in order that he might make efforts to secure a transfer to some other position in the Government service, would be terminated with the understanding that, although plaintiff while on leave without pay would be officially a part of the Prison Service, he could not report back for duty at Lewisburg. Pennsylvania. but would be in the status of an employee on leave without pay pending his efforts to secure a transfer to some other branch of the Government service, did not in any way or at any time give plaintiff the right to demand the position of prison guard from which he had been removed, or the pay thereof. Plaintiff has no right by statute or otherwise to recover compensation from the Government because he was not given some other position in the Government service. and the termination for the good of the service of plaintiff's appointment while he was in the status of an employee on leave without pay, after he had been given an opportunity to obtain a position in some other branch of the Government service to which he could be transferred, was clearly not illegal. Moreover at the time plaintiff's appointment, while he was in the status of being merely an employee on leave without pay, was terminated for the good of the service on January 15, 1936, plaintiff was not holding any position in the Government service from which he was entitled to any compensation. In any event, we think plaintiff was guilty of laches after January 15, 1936, in asserting his claim, Arant v. Lane. 249 U. S. 367, 369-372. The fact that plaintiff was an honorably discharged soldier does not under the facts of this case affect the decision. Keim v. United States. 177 U. S. 290, 295, 296; Medkirk v. United States, supra.

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Reporter's Statement of the Case The defendant's motion to dismiss is sustained and the petition is dismissed. It is so ordered.

Madden, Judge; Jones, Judge; Whitaker, Judge; and Whaley, Chief Justice, concur.

CALIFORNIA MILLING CORPORATION v. THE

# UNITED STATES INo. 45064. Decided January 5, 19421

On the Proofs

Government contract; nonpayment of processing tax.-Decided upon the authority of United States v. Kensus Piour Mills, 314 U. S. 212 (92 C. Cls. 390, reversal).

The Reporter's statement of the case:

Rhodes, Kleninger & Rhodes for the plaintiff. Mr. Hubert I. Will with whom was Mr. Assistant Attorney

General Samuel O. Clark, Jr., for the defendant, Messrs. Robert N. Anderson and Fred K. Duar were on the brief.

The court made special findings of fact, as follows, pursuant to the stipulation of the parties:

1. Plaintiff is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in Los Angeles, California. Plaintiff is the sole owner of the claim sued upon and has never assigned the same or any part thereof, or any interest therein. At all times mentioned herein, plaintiff was engaged in the business of manufacturing flour and related products from wheat for sale to various buyers, including the United States.

2. On the 22nd day of October 1936, pursuant to an award made to it by the Veterans' Administration, plaintiff and defendant entered into a contract, numbered VAS-9457, under the terms of which plaintiff agreed to sell to the defendant, and the defendant agreed to purchase from the plaintiff four hundred (400) barrels of hard wheat flour and three hundred (300) barrels of soft wheat flour, for which 449273-42--CC--val 95-----31

Repeter's Statement of the Case
the defendant agreed to pay to plaintiff the sum of three
thousand eighty dollars (\$3,060.00). Plaintiff performed
the contract and delivered the flour sold thereunder, and
same was approved and accepted by defendant.

same was approved and accepted by defendant.

3. Thereafter a voucher (No. 27686) to cover the payment of this sum was issued by the Veterania Administration for payment. Of the sum of \$8,900,00, the sum of \$8,928 was deducted and withhold by the Acting Comproller General of the United States, who, on April 29, 1907, issued a Notice of Settlement of Claim (Certificate No. 044273), Claim No. 062327(29), in which he ortified that Shyoloma and the plaintiff under the centract but that, of that amount, the sum of \$822.80 had been credited by him against an alleged indebtectness of that amount on account of certain under cartino there controlled the sum of the control of the sum of the cont

4. Theretofore, on August 28, 1835, and September 19, 1935, the plaintiff and defendant had entered into contracts numbered VAS-1788 and VA\$0-961, respectively, for the ale to the defendant of flour and other wheat products. There follows an except from one of these contracts which is typical of the price provision contained in both of them and that contained in all of the invoices issued to the defendant by the plaintiff covering the two contracts.

Prices set forth herein include any Federal tax heredrose imposed by the Congress which is applicable to the reason in the Congress which is applicable to the processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after contract is based and made applicable directly upon the production, namifecture, or also of the supplies ment by the contractor on the articles or supplies herein contracted for, them the prices named in this contraccountracted for, them the prices made in this contraccountracted for, them the prices made in this contractor of the prices of the contractor as a result of such change will be charged to the Government and cattered on vouchers.

Plaintiff made delivery of all flour and other wheat products provided for in these two contracts, same was accepted by Opinion of the Court

defendant, and defendant paid to plaintiff the bid or contract price therefor.

5. Plaintiff was the processor of the wheat from which foliur was manufacturely but as a result of action taken in courts of the United States, the Collector of Internal Revenue was esploined from collecting from domestic processing tax was paid by the plaintiff on any of the wheat used in the manufacture of the flour delivered to the district of the state of the

Finding 4 above, the Secretary of Agriculture, in secondance with the authority rested in him by the provisions of the Agricultural Adjustment Act of May 12, 1033 (48 Stat. 31), as anmedict, had, by wheat Regulations approved by the Freident, established the rate of processing tax imposed on the first domestic processing of wheat and the conversion on the first domestic processing of wheat and the conversion special product manufactured from wheat. Under such regulations that tax was fixed at 30 counte per land on all wheat processed, the conversion factor applicable to wheat flour was fixed at 500°d to per bound, and the conversion factor applicable to graham flour and cracked wheat was Excel 4.00°d cents per pound,

7. The amount of the processing taxes which the defendant alleges were included in the contract price of the flour and other whest products delivered to the defendant under the two contracts mentioned in Finding 4 above, is as follows:

Contract Contract	No. VAS-1788	\$482. 39.	
(Total		erron	-

The court decided that the plaintiff was not entitled to recover.

Memorandum per curiam: Consideration of this case has been withheld for some time because an exactly similar case, that of UNITED STATES V. KANSAS FLOUR MILLS CORPORATION, has been pending in the Supreme Court. December 8, 1941. the last named case was decided (314 U. S. 212), the Supreme Court holding contrary to the contentions made by the plaintiff in the case now before us. Following the ruling and holding of the Supreme Court judgment will be entered in the instant case dismissing the plaintiff's petition, and against it for the costs of printing the record as provided by law.

# JOHN HAYS HAMMOND, JR., v. THE UNITED

[Nos. 45330 and 45332. Decided January 5, 1942]

On Motion for Reconsideration

Patents for radio equipment; claims held not to be inconsistent .-Where on August 25, 1941, the defendant filed a motion in each case in suit asking "for an order requiring the plaintiff to elect between the two inconsistent claims for compensation allegedly resulting from one and the same act (the use of certain radio equipment) as set forth in the netition"; and where on Scutember 6, 1941, an order was made by the court directing plaintiff "to elect whether he will prosecute his claim as a breach of contract, or under the jurisdictional patent act, and to amend his petition accordingly": and where, thereupon, plaintiff filed a motion asking the court to reconsider and vacate said order; and where the plaintiff later in onen court amended his petition so as to state his claim in the alternative for compensation under section 68. Title 35, or section 250. Title 28. U. S. C. A., rather than under both said sections of the Code, as the petitions were originally drawn; It is held that, aside from the possible difference in character or degree of the proof required (as to which the court expresses no ontnion), the claims are not found to be inconsistent in the sense that plaintiff is required to elect whether he will claim compensation for unauthorized use without license or consent under the Act of 1910, as amended, or for compensation for unouthorized use without Beense or consent contrary to the written agreement between the parties.

Mr. Raymond M. Beebe for plaintiff. Mr. Nathaniel L. Leek and Mesers. Davies, Richberg, Busick & Richardson were on the brief.

Mr. Paul P. Stoutenburgh, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant. Opinion of the Court

The facts sufficiently appear from the opinion of the court.

Littleton, Judge, delivered the opinion of the court: The petition in case No. 45330 filed January 11, 1941, involves five U. S. patents and case No. 45332 filed January 21. 1941, involves eleven other U. S. patents, all relating to certain radio equipment. The petitions in both cases as they now stand ask judgment against the United States (1) under the Act of June 25, 1910, as amended by the Act of July 1, 1918, Tit. 35, U. S. C. A., section 68, for reasonable and entire compensation for infringement through the manufacture and/or use by the United States of the patented inventions described in the petitions without right. license, or authority of the owner thereof; or (2) under section 250, U. S. C. A., Tit. 28, "as compensation for the unlawful and unauthorized use of the inventions in disregard of the provisions of said contract." Each petition separately and succinctly sets forth allegations of fact as to the right to compensation under Tit. 35, U. S. C. A., section 68, by reason of manufacture and use by the defendant without the consent of the patentee, or a license so to do (infringement), or for compensation under section 250, Tit. 28, U. S. C. A., for unauthorized manufacture and use by reason of failure of defendant to comply with a contract with plaintiff under which a license for a limited use of certain patents was granted.

Paragraphs 1 to 5, inclusive, of the petitions set forth the necessary preliminary facts.

one necessary prenumary races.

Francypals of to \$0, dischesive, set forth (1) that the deParegraphs of to \$0, dischesive, set some of the cetain of the patents for the manufacture and use of the
inventions for the purpose of radio dynamic control only
and not for purely radio communication purposes or any
other purpose than radio dynamic control (3) that the
defendant had been granted a relesse from any and all
inability arising out of or based upon the furnishing to it
by another for such limited use of any supparatus covered
claims of the patients without the license or consent of balanclaims of the patients without the license or consent of balan-

tiff by the manufacture by the defendant and/or by the use

by it for communication purposes and for purposes other than railo dynamic control of radio equipment as provided than railo dynamic control of radio equipment as provided not be a real radio of the part of the

In paragraphs 11 to 14, inclusive, the petitions proceed to allege (1) that pursuant to an agreement of July 30, 1932, between plaintiff and defendant, the parties on April 22, 1933, entered into a license contract for the use by defendant of the inventions covered by certain patents for the purpose of radio dynamic control only and the defendant expressly agreed not to use the inventions set forth in the patents described for purely communication purposes or for any other purpose, except for radio dynamic control; (2) that the plaintiff has in every respect fully and completely performed the contract; (3) that the defendant on its part has failed to perform the contract and has violated the same by using and/or manufacturing, or having manufactured for it, radio equipment embodying the inventions set forth and claimed in the patents for communication purposes and for purposes other than radio dynamic control to the great damage of plaintiff; and (4) that the defendant had been duly notified prior to and during the past six years of its violations of said contract, but that, notwithstanding such notices, the defendant has continued to violate said contract by using and/or manufacturing, or having manufactured for it, radio equipment embodying the inventions set forth and claimed in the patents for communication purposes and for purposes other than radio dynamic control to the great injury to plaintiff by reason of loss of gains and profits which he otherwise would have received.

August 25, 1941, the defendant filed a motion in each case asking "for an order requiring the plaintiff to elect between the two inconsistent claims for compensation algody resulting from one and the same set [the use of certain radio equipment] as set forth in the petition. Spenmer 6, 1941, an order was made directing plaintiff "to elect whether he will prosecute his claim as a breach of contract, or under the jurisdictional potent act, and to amend his petition accordingly within thirty days" from the contract of the contract was had. Since the making of the original order the plaintiff in open court tive; i.e. for commensation under section 65, Th. 38, U. S.

C. A., or section 250, Tit. 28, U. S. C. A., rather than under both sections of the Code as the petitions were origi-

nally drawn.

Aside from the possible difference in character or degree of the proof required (about which we now express no opinion) under the alternative claims under the facts set forth in the petitions, we do not find the claims to be inconsistent in the sense that plaintiff is required to elect whether he will claim compensation for unauthorized use without license or consent under the act of 1910 as amended by the act of 1918, or for compensation for unauthorized use without license or consent contrary to the written agreement hetween the parties. If plaintiff were claiming in the same suit compensation for use of the inventions under and pursuant to a contract or license, and therefore with the consent of plaintiff, or for infringement of the inventions without the consent or license of plaintiff, the claims would be inconsistent and plaintiff would, in such case, he required to elect which remedy he would pursue, and if he recovered on the one chosen he could not later also recover on another. May v. Le Claire, 11 Wall. 217; United States v. Oregon Lumber Co., et al., 260 U. S. 290; Kendall v. Stokes, 3 How. 87; Dahn v. Davis, 258 U. S. 421. But if plaintiff lost on the one chosen, because it was found not to exist, he would not, in such a case, be barred from pursuing the other remedy if not barred by limitation. Ash Sheep Co. v.

Opinion of the Court United States, 252 U. S. 159; Bierce, Limited, v. Hutchins, 205 U.S. 340. In the present suits the alternative claims are based upon alleged unauthorized use by the defendant of the patents without the consent or license of plaintiff. and plaintiff claims compensation only for that alleged unauthorized use. If the written contract between the parties and the written nonexclusive license of plaintiff to the Government thereunder for the use of the patents had stated that the nonexclusive rights were granted "for radio dynamic uses only" and nothing further was said in the agreement or license, any other use or uses of the inventions by the defendant would certainly be unauthorized and would constitute an infringement of the patents for which, upon proper proof, plaintiff would be entitled to compensation. What effect the further provision in the contract and license. i. e. "but no use of the patents and/or inventions of Schedule II for purely radio communication purposes is authorized," had upon the rights of plaintiff or the degree or character of proof necessary to sustain the claim, we do not now decide. But we think it is clear that since the alternative claims here made are based upon unauthorized use of the inventions they are not inconsistent merely because plaintiff, as one ground for recovery of compensation, alleges that the defendant expressly agreed not to use the inventions for the purpose for which it is alleged it did use them and, as another ground for compensation, that the defendant so used the inventions for the same purposes without authority and without consent or license of plaintiff. One recovery only is claimed and only one can be allowed. We have considered the cases relied upon by the defendant but find it unnecessary to discuss them because they are not, upon their facts and circumstances, applicable here.

The petitions might have been drawn so as specifically to separate each petition into two designated counts: the first count being paragraphs 6 to 10, inclusive, and the second, an alternative count, being paragraphs 11 to 14, inclusive. But failure to frame the petitions in this form does not affect the question now being considered. Each petition in substance is in two counts, which for the sake of brevity may Oninion of the Court

be termed respectively the "patent count" and the "contract count." In order to avoid confusion in the taking of proof and the presentation of these alternative claims the commissioner to whom these cases are referred for the purpose of taking the evidence and making a report of the facts is hersby authorized and directed to control the manner and sequence in which the evidence shall be presented. Such control of the procedure is essential in order that, so far as may be necessary, the facts relating specifically to the one count should not be confused with facts relating solely to the other count. Also, the parties, the commissioner, and the court are entitled to know to which count certain evidence pertains in order that the opposing party may properly present objections. The facts with reference to the alternative claims asserted are separately and distinctly set forth, and the necessary preliminary allegations contained in paragraphs 1 to 5, inclusive, and the formal allegations in paragraphs 15 to 19, inclusive, of each petition are applicable to both claims. Had the plaintiff filed separate suits, as he might have done, the defendant certainly could not object to either. Troxcll, Administratriz v. Delaware, Lackawanna de Western Railroad Co., 227 U. S. 434; Ash Sheep Co. v. United States, supra; Lovejoy v, Murray, 3 Wall. 1; Brady v. Daly, 175 U. S. 148. Had that course been pursued the senarate suits could and probably would have been consolidated for hearing and decision since both claims would involve the right to compensation for unauthorized use without the consent or license of the patentee. But separate suits are not necessary in the circumstances. This is the only court having jurisdiction of the claim for compensation asserted by plaintiff and the court is not bound by the strict rules of pleading. Peirce v. United States, 1 C. Cls. 195, 196; Brown v. District of Columbia, 17 C. Cls. 303. 310; Eager v. United States, 33 C. Cls. 336, 337; United States v. Burne, 12 Wall, 246, 254; United States v. Rehan, 110 U. S. 338, 347. In the latter case the court said:

In a proceeding like the present, in which the claimant set forth, by way of petition a plain statement of facts without technical formality, and prays relief either in a general manner, or in an alternative or cumulative form, the court ought not to hold the claimant to strict technical rules of pleading, but should give to his statement a liberal interpretation, and afford him such relief as he may show himself substantially entitled to if within the fair scope of the claim as exhibited by the facts est forth in the nettion.

To the same effect are Baird v. United States, 131 U. S. Appx. civ, cvii; District of Columbia v. Tatty, 182 U. S. 510, 513; District of Columbia v. Barnes, 197 U. S. 146, 154. In Clark v. United States, 95 U. S. 359, the court said at p. 543:

If objected that the petition contains no count upon an implied contract for quantum nerval; it may be answered, that the forms of pleading in the Court of Claims are not of so strict a character as to preclude the plaintiff from recovering what is justly due to him upon the facts stated in his petition, although due in a different aspect from that in which his demand is conceived.

See, also, Minar v. Sheshy, 13 Fed. (2d) 290; Twachtman v. Connelly, 106 Fed. (2d) 501.

Plaintiffs motion of September 29, 1941, for reconsideration of the order of September 9, 1941, is allowed. The order of September 6 directing plaintiff to elect is vesseted and set saids and the defendant's motion of August 28, 1941, for an order requiring plaintiff to elect between alleged intension of the court of the second plaintiff to elect between alleged intension of the court of the court of the court of February 15, 1941, allowing defendant's motion of Esbruary 7, 1941, to which plaintiff consented, for an order requiring plaintiff to make the petitions more definite and certain in certain particular.

Madden, Judge; Jones, Judge; Whitaker, Judge; and Whaley, Chief Justice, concur.

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ALABAMA COTTON COOPERATIVE ASSOCIATION AS SUCCESSOR TO ALABAMA FARM BUREAU COTTON ASSOCIATION, A CORPORATION, v. THE UNITED STATES

Congressional No. 12759

CALIFORNIA COTTON COOPERATIVE ASSOCIA-TION, LTD., A CORPORATION, v. THE UNITED STATES

Congressional No. 17751 GEORGIA COTTON GROWERS COOPERATIVE AS.

SOCIATION, A CORPORATION, v. THE UNITED STATES Courressional No. 17752 LOUISIANA COTTON COOPERATIVE ASSOCIA-

TION, A CORPORATION, v. THE UNITED STATES

Congressional No. 17758 MID-SOUTH COTTON GROWERS ASSOCIATION, A

CORPORATION, v. THE UNITED STATES

Congressional No. 17754 MISSISSIPPI COOPERATIVE COTTON ASSOCIA-TION, A. A. L., A CORPORATION, v THE UNITED STATES

Courressional No. 17755

NORTH CAROLINA COTTON GROWERS COOPERA-TIVE ASSOCIATION, A CORPORATION, v. THE UNITED STATES

Congressional No. 17756

OKLAHOMA COTTON GROWERS ASSOCIATION. A CORPORATION, v. THE UNITED STATES

Congressional No. 17757

Congressional No. 17758

TEXAS COTTON COOPERATIVE ASSOCIATION, A CORPORATION, v. THE UNITED STATES

> Congressional No. 17780 REPORT TO THE SENATE

[Filed January 20, 1942]

Federal Farm Board Operations; responsibility for losses sustained by cooperative marketing associations in connection with stabilizing operations in cotton; cases dismissed on motion of plaintiffs.-Report to the Senate with respect to dismissal of cases brought under the provisions of Sengte Resolution 257. 76th Congress, third session (page 4405, Congressional Record) referring to the Court Senate bill No. 2585.

The facts sufficiently appear from the report to the Senats, as follows:

To the Suprage or our University Spaces.

Under date of April 15, 1940, your honorable body, acting through its secretary, Hon. Edwin A. Halsey, transmitted to the Court of Claims of the United States a resolution reading as follows:

S Res 957

IN THE SENATE OF THE UNITED STATES,

April 18 (legislative day, April 8), 1940. Resolved. That the bill (S. 2585) entitled "A bill to reimburse the cotton cooperative associations for losses occasioned by the Federal Farm Board's stabilization operations, and for other purposes", now pending in the Scnate, together with all the accompanying papers, be, and the same is hereby, referred to the Court of Claims, in pursuance of the provisions of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary", approved March 3, 1911; and the said court shall proceed with the same in accordance with the Report to the Senate in accordance therewith.

Attest:

Eowin A. Halsey, Secretary.

The above-named petitioners filed identical petitions in this court in due form on October 10, 1940, alleging in appropriate language an obligation of the United States to re-imburse them for losses necessarily incurred because of the stabilization operations during 1929-1930 of the Federal Farm Board, an established agency of the United States.

The defendant filed a general traverse and asked that the petitions be dismissed.

A commissioner of this court was duly assigned, authorized, and directed to take such testimony as might be offered by the petitioners and the defendant upon the issues raised in the several cases.

The commissioner commenced the baaring of testimony at New Orleans, Localisan, on Norember 17, 1941, 1801. Wm. J. Hollowsy of Okhahoma, and Hon. Crampton Harris of Alabama, appearing forth petitioners, and G. C. Sherrof, Enq., and Newell A. Clapp, Enq., for the defendant. The taking of the centionary proceeded on the 17th, 19th, and 19th of November, and comprised, to this point, a general background of the centionary proceeded on the 17th, 19th, and 19th of November and comprised, the second of the comprehensive control of the Control of the America of Column Corporation of the Control Stabilization Corporation, The Farm Credit Administration, and their relationship with each other.

On the morning of Novumber 20, 1941, when the commissionare opeand the hearing for the purpose of proceeding, plaintiffs counsel made a motion for an adjournment of the hearing, being his motion on the fact that he had jute rebarring, being his motion on the fact that he had jute repulsed the second of the second of the second of the Dubber Wheat Corner Association v. The United States, of C. Cla. 202, which was a case referred by the Congress to the Court of Calina, such which embraced substantially the same regard to cotton. (The vito message will be found in the Congressional Bosocia of October 33, 1945).

Report to the Senate Plaintiffs' counsel stated that, as a result of the Wheat Growers Association case, the Congress of the United States had appropriated money by Joint Resolution to carry out the implied effect of the Court of Claims decision in that case. Plaintiffs' counsel further stated that, if at the end of the present cases the result should be an appropriation by the Congress for the benefit of the cotton associations, and if the Chief Executive should yeto the measure, then, as a practical matter, it was a serious question whether time was being wasted in continuing the hearing of the present cotton cases, which would occupy several weeks of taking testimony, with attendant expense of bringing witnesses from many states. Counsel for plaintiffs read the veto message of the President. and moved for an adjournment of the hearing in order to consider and advise what course should best be followed in this situation.

Counsel for the Government objected to the adjournment of the hearing, stating that the Government had gone to great expense in preparing the defense in the present cases, that they were prepared to try the cases, and desired to proceed.

After hearing full argument of conneel for plaintiff and defendant, the commissioner granted an adjournment of the hearing for two weeks, based on the statement of conneel for plaintiffs to the effect that, as at present advised, it would be seen that their best course would be to discontinue the caseswing and dismiss them. If, however, they should discide not to do so, the hearings were to be resumed at the end of the two-week period.

Under date of December 6, 1941, counsel for the plaintiffs made motions before the Court of Claims to dismiss the cases, that motion reading in each case as follows:

#### MOTTON TO DISATES

To the Honorable Chief Justice and Associate Judges of the Court of Claims of the United States: Now comes the plaintiff in the above styled cause and

respectfully shows unto this Honorable Court the following facts: Report to the Senate

 The Federal Farm Board in 1929 and 1930 undertook stabilization operations in grain and cotton. In its operations it utilized cooperative marketing associations composed of wheat growers in the wheat belt and cotton growers in the cotton belt. The cooperative associations incurred carrying charges and overhead expenses

in the stabilization program.

2. On January 8, 1940, this Court handed down an opinion in Case No. 48298, South Dakota Wheat Groners Association, Inc. vs. the United States. Thereafter, the House and Senate of the United States passed Senate Joint Resolution 39, "for he relief of the South Dakota

Wheat Growers Association, Inc."
On October 23, 1941, the aforesaid joint resolution
was returned to the Senate with an accompanying veto
message in which the following language appears:

"The stabilization program was certified on at great expense to the Government, was conducted primarily in the interest of the wheat provers, principle to schainmanize their products at higher prices; and they held the wheat off the market at the request of the Board as corn behalf. As participants in this program, it was necessary for the copperatives to incur obligations for non-market their principants in this program, it was necessary for the copperatives to incur obligations for no antifectory spitification for the Government's assuming these charges in addition to the substantial losses and expenses which is incurred in taking over the

wheat at a time when the market price had declined below the loan price."

3. At the time plaintiff filed its claim in this Court plaintiff and its counsel were firmly convinced of the fundamental justice and merit of the plaintiff's claim.

That conviction is today as strong as ever, be of the same view as plaintiff and its counsel, it would still be necessary for the Congress of the United States to pass a joint resolution or an act appropriating money for the relief of the plaintiff, which resolution or act would necessarily go to the President of the United States for his resolution or act would necessarily go to the President of the United States for his

essarily go to the President of the United States for his approval or disapproval.

In view of the similarity between the claim for storage and carrying charges on wheat and plaintiffs claim

age and carrying charges on wheat and plaintiff's claim for carrying charges and overhead expenses on cotton, and in view of the stress of the present national situation, it is very much to be doubted whether such joint resolution or act would receive the approval of the Chief

Executive.

In the light of the facts above stated it now appears to plaintiff and its counsel that it would be inadvisable to continue further with the presentation of evidence in this Court.

Wherefore, the premises considered, plaintiff does herewith pray that it be allowed to dismiss its claim and that an order of dismissal be entered herein.

The defendant's response to plaintiffs' motions is as follows:

RESPONSE OF DEFENDANT TO PLAINTIFF'S MOTION TO DISMISS

## (Filed Dec. 16, 1941)

Comes now the defendant, by its Assistant Attorney General, and in response to plaintiff's motion to dismiss states:

1. The motion to dismiss leaves unclear whether plaintiff is wholly abundoning its claim or merly abandoning its claim for the present with the intention of renewing the same before Congress or this Court at what is deemed a more opportune time. The statements of plaintiffs counsel at the hearing in New cate that the claim is not being permanently abandoned. 2. The defondant, of course, has no objection to

2. The derendant, or course, has no cojection to allowance of the motion if plaintiff gives definite assurance that a dismissal means permanent abandonment of the claim. In such event an investigation and determination of the facts would serve no useful purpose.

3. An entirely different situation is presented if the motion to dismiss is based upon present expediency, with the intention of renewing the same before the Congress or this Court at a time deemed more propitious. The allowance of a motion so predicated would be contrary to the express wishes of the Senate, prejudicial to the rights of defendant, and against sound public policy.

 The instant case is one of thirteen cases referred to this Court by the Senate on April 12, 1940, to investigate and determine the facts and report them to the Senate. Report to the Senate

in accordance with section 151 of the Judicial Code.1 The claims presented in the thirteen cases total in excess of four and one-quarter millions of dollars and involve substantially the same facts relating to the activities of the Federal Farm Board during the cotton season of 1929-1930. The claims have been actively prosecuted by the claimants before the Federal Farm Board and the Congress since 1930. The costs to the Government with respect thereto have been very substantial. By the reference of the cases to this Court, the Senate has clearly indicated its desire that the facts be determined finally and that each claimant be placed "in such a position upon the record that he will be morally, if not legally, concluded from again troubling Congress." In deference to the wishes of the Senate, the facts should be investigated, determined, and reported unless the claimants are ready to give definite assurance that the claims are being permanently abandoned.

5. Following the reference by the Senate and the filing of petitions in the cases, the Government made a thorough investigation at a cost to it of thousands of dollars. On November 17, 1941, hearings were commenced before a Commissioner at New Orleans, Louisiana. These hearings continued until November 20, 1941, at which time they were adjourned at the request of the plaintiffs and over the objection of defendant. These hearings involved additional expense to defendant and the Court, If the claims are renewed at a future date, defendant would be forced to reinvestigate the facts and reprepare them for presentation. There is serious doubt, particularly in view of the factor of age, whether important witnesses on behalf of defendant would be available to testify. Important books, records, and other documents may become lost or destroyed. It is to be noted, in this regard, that the claimants in prosecuting their claims before Congress, presented special reports or audits based on certain theoretical formulas to show the amount of money each had spent during the cotton season of 1929-

<sup>\*</sup>The cases as referred are Membrids in this event as Congruented Cases, New 11770-11770, both becoints: On Gottone 10, 1960, the Caislanant is here are a branches of the American et al. (1988) and the contradiction of the Congruente (1988) and the contradiction of the Congruente (1988) and the contradiction of the Congruente (1988) and the Congruente (1988) are the Congruente (1988) and the Congruente (1988) are the Congruente (1988) and the Congruente (1988) and the Congruente (1988) are the Congruente (1988) and the Congruente (19

# Report to the Senate

1800 for carrying charges on octon and for overhead, and for which they were and are aking reimbinsment. and for which they were and are aking reimbinsment. Out of the control of the con

6. The power of this Court to overrule the motion to dismiss is beyond question. It is well established that a court may in the exercise of a sound discretion deep a motion to dismiss if the rights of defendant may be Castral Transportation Company, 171 U. S. 188, 162 (Castral Transportation Company, 171 U. S. 188, 162 (Teenenulle Banking of Trant Co. v. Selocu, 28 F. (24) 78, 80; Young v. Southern Pacific Co., 26 F. (24) (39). There is here the additional consideration that the Senate between the control of the Company of

#### CONCLUSION

The Court should require plaintiff clearly to state whether its claim is being permanently abandoned. If assurance to such effect is given, the motion to dismiss should be allowed and a report made to the Senate relative to the ground of the dismissal. Absent such assurance, the motion to dismiss should be overruled. Respectfully submitted.

Francis M. Shea, Assistant Attorney General.

Grover C. Sherbod, Newell A. Clapp,

#### Attorneys for defendant.

The bill pending in the Senate contemplates reimbursement of the cotton cooperatives for alleged losses, which involve no legal or equitable claim against the Government, but a gratuity or bounty, and, by their voluntary motions to dismiss, claimants declare their intention to withdraw all claim to action on the bill by the Senate. In view of this situa-

#### Syllahus

tion, and in order to obviste the excessively heavy expense to which both parties would be subjected in bringing their witnesses from various states for the purpose of testifying, the Court, in the exercise of its sound discretion (171 U.S. 488, 1461), unanimously granted petitioners' motions and ordered the exess dismissed on Janary 5, 1948.

By order of the Court the foregoing report is certified to the United States Senate.

#### the Chite

RICHARD S. WHALEY, Chief Justice.

LETTLETON, Judge, is of opinion that before making a report to the Senate the court should allow the Government to proceed and submit such evidence as it may have with reference to the subject-matter of Senate Bill 2865.

# GREAT LAKES CONSTRUCTION COMPANY v. UNITED STATES

[No. 43512. Decided February 2, 1942]
On the Proofs

Government control; iscomplete plena. "When patiently, a comtractor, extered to a contract with the Government for the construction of a Federal positroniary near Levidour, Fu.; and where the preparation of plena and specifications was also provided to the proparation of plena and specifications was prints were supplied to plaintiff with additions and corretions made by blue percil and no revised basepart containing all the insertions was ever given to plaintiff; it is held that misconferentiating, containing, or evidently and relatified in accordment of the property of the property of the property of the misconferentiating, containing, or evidently and relatified in accord-

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Some; indefiniteness of damages; austrantial proof—Where a plaintiff has been legally wronged, indefiniteness of proof as to the
exact amount of damages will not prevent a recovery (Manfield & Some Oo, v. United States, 94 C. Cls. 857) but there
must be tampible evidence of substantial damage.

## The Reporter's statement of the case:

Mr. T. I. McKnight for the plaintiff. Sims, Handy, McKnight & Carey were of counsel. Mr. Carl Eardley, with whom was Mr. Assistant Attor-

ney General Francis M. Shea, for the defendant. Mr. J. Robert Anderson was on the brief.

The court made special findings of fact as follows:

1. Great Lakes Construction Company, plaintiff, is a coproration organized under the laws of the State of Illinois, with its headquarters in the City of Chicago, Illinois. It has done a general contracting business since 1920.

2. Pursuant to the provisions of an act of Congress, ap-

proved May 27, 1930, (46 Stat. 389) the Attorney General of the United States was empowered to select and procure a site to serve the northeastern section of the United States, as a penitentiary for the confinement of male persons convicted of offenses against the United States. The site selected was near Lewisburg, Union County, Pennsylvania,

The Secretary of the Treasury, on request of the Attorney General, contracted for the turnishing of plans, specifications and estimates for the construction of the buildings to be erected on the site so subsettle. Congress made appropriations for the purchase of the site, and for the construction and equipment of the buildings thereon. The money so appropriated was to be expended under the direction and

upon the written order of the Attorney General.

3. On July 93, 1905, the Secretary of the Treasury entered into a contract with Alfred Hopkins, an experienced architect of New York City, for periminary aketches and specifications, sufficient for an estimate of the cost of the peninteniary. On November 18, 1906, the Secretary of the Peninteniary on November 18, 1906, the Secretary of the Peninteniary on the Peninteniary on the Peninteniary of the Contract of the Penintenia Contraction of the Penintenia architect for the planning and construction of the building.

Reporter's Statement of the Case 4. There was an understanding between the Department of Justice and the Treasury Department to the effect that the Attorney General would sign the contract for the construction of the penitentiary, and that the Treasury Department would contract for the necessary architectural services. It was understood that Architect Honkins would supervise and superintend the construction; that the Treasury Dopartment would have periodical inspections and final inspection made by engineers of the Office of the Supervising Architect in the Treasury Department, and that technical advice would be rendered by that office. It was further understood that if during the progress of the work modifications of the then existing contracts were desired, proposals for such changes would be obtained by Architect Hopkins for action by the Department of Justice.

5. On November 29, 1930, the Office of the Supervising Architect of the Treasury Department sent to all prospective bidders, including plaintiff, 67 blueprint general plans and 26 blueprint mechanical drawings which were accompanied by the specifications, and invited proposals for the performence of the work required. The blueprints were made from the architect's original tracings, on file in the Office of the

Supervising Architect. On January 19, 1931, plaintiff submitted its bid for the construction of the penitentiary, based on the plans and specifications furnished by the Office of the Supervising Architect, for the sum of \$2,781,800.00. The bids were opened and plaintiff's proposal was found to be the low bid. On January 31, 1931, plaintiff and the United States, represented by the Attorney General, entered into a contract for the construction of the Federal Penitentiary at Lewisburg. Pa. Plaintiff agreed to furnish all labor and materials, perform all work required for the construction of the penitentiary, including an enclosure wall and all grading and drainage within the wall, and a 10-foot level area on the outside of the wall, in accordance with the specifications. schedules, and drawings, together with the addendum specifications Nos. 2, 3, and 4, dated, respectively, December 22, 1930, and January 6 and 8, 1931. The contract and speci-

fications and addendum specifications Nos. 2, 3, and 4 are

Reporter's Statement of the Case of record as plaintiff's exhibits 1 and 2 and are by reference

of record as plaintiff's exhibits 1 and 2 and are by reference made a part of this finding.

6. The contract provided that work be commenced as soon

6. The coltract provinces man work to commence as soon as practicable after the receipt of notice to proceed, which notice was given plaintiff on February 14, 1931, and the contract was to be completed within 425 calendar days thereafter, which fixed the date for the completion on or prior to April 141, 1939.

The penientiery, as designed by Architect Hopkins, was of highly ornamental construction, based on a building in Italy of the Renaissance period, showing fingerprints on the modied brick, containing beiging or wany walls, sagging rafters like a Chinese pagoda, a large sculptured group of angels 10 ft. wide and 14 ft. high weighing 14 tons, which will be the contraction of the condifferent shares of bricks.

7. Plaintiff's claims for recovery fall into the following

classes:
a. Balance due on the contract price; not contested by the

 Extras ordered but not paid for; not contested by the defendant.

c. Extras ordered but not paid for; contested by the

d. Damages due to defendant's interference and delay; contested by the defendant.

The items in plaintiff's petition, as modified by statements in its briefs, may be rearranged as follows:

9. Added hospital equipment

10 Added stack work

1. Items not contested by the defendant: 1. Balance due on contract \$1, 277, 99 2. Supp. 70 (70A) 47.72 8. Supp. 44\_\_\_\_\_ 20, 198, 53 4. Correction in screens 121, 12 5. Connecting kitchen equipment. 1,801,69 6. Euclosure wall extres 12,773,77 7. Extra terra cotta copings. 9,527,78 8. Extra cinders 3, 527, 47

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2. Claims disputed by the defendant:	
1. Temporary heat and winter protection	
2. Moulded brick in entrance building	
3. Emergency surcharge on freight	
4. Extra bulk excavation	5, 8
5. Additional sidewalks	

8. The Attorney General of the United States signed the contract on behalf of the United States and also was the "head of the Department," as defined in Article 18 (a) of the contract. Mr. Sanford Bates, then Director of the Bureau of Prisons of the Department of Justice, was the authorized representative of the contracting officer, as provided for in Article 18 (b); during the absence of Mr. Bates, either Mr. W. T. Hammack or Mr. James V. Bennett. both Assistant Directors of the Bureau of Prisons, served as the contracting officer's authorized representative: the general conditions of the specifications, paragraph 10, state that the architects mentioned are "Alfred Hopkins and Associates, 415 Lexington Avenue, New York City."

The contract between the architect and the Treasury Department provided for the superintendence of the work by a competent engineer or engineers, constantly on the job. Thomas C. Peterson was employed by the architect as such engineer, and he superintended the work at the site. Mr. Peterson made daily progress reports, and assisted in preparing monthly progress reports as a basis for making monthly payments to the plaintiff. Article 8 of plaintiff's contract provided for the superintendence of the work at the site by a competent representative of plaintiff, authorized to act for him. Walter Landin was employed by plaintiff as such superintendent, and remained on the work throughout the contract, made daily and weekly reports. and assisted in preparing monthly reports. He was not called as a witness by plaintiff. Mr. Peterson, the architect's superintendent, and Mr. Landin, plaintiff's superintendent, worked in harmony during the course of the work. and cooperated in expediting construction.

#### Reporter's Statement of the Case

#### 9. Article 3 of the contract reads as follows:

Changes .- The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Many changes were made in the drawings plans and specifications during the performance of the work. Such changes were accomplished by means of supplemental contracts in writing, with three exceptions. These supplemental contracts were effected in the form of invitations from the architect to the plaintiff describing the changes desired, together with the necessary revised plans and specifications; plaintiff then submitted proposals in writing, offering to perform the changed work at a certain price, and such proposals were then accepted in writing by the contracting officer's representative. The three exceptions to this procedure involved changes in the kitchen and outside sewer lines, and are included in proposed supplemental contracts Nos. 52, 70, and 70A. In these three instances the parties could not agree, at the time, as to the compensation plaintiff should receive for such additional work. However, in each of the three instances the contracting officer issued to plaintiff an order to proceed to make the change subject to a later determination as to the amount of increased compensation, which amounts were later determined by the contracting officer, and accepted by plaintiff, with neither protest nor appeal.

With noticer process nor appeal.

During the progress of the work, 100 pluring a nor made, 200 pluring process of the work and pluring no change with the contract components of the total of a mount not greater than \$200. Only six, of the total of 100 pluring the contract requiring adultional work, the total of increased compensation to plaintiff amounted to \$195,334.07. This sum included 10% oreclead, and 10% profits, allowed plaintiff in all cases in arriving at the increased compensation under the supplemental contracts. Defections from the contract price amounted to \$137,355.00.

10. In most instances the changes made in the contract were agreed upon in writing long enough in advance so as not to delay plaintiff in the progress of its work. Disputes frequently area as to the anomot of increased or decreased to the contract of the contract of the contract of the contract to the superving architect of the Trausury Department, who then precommended the amount or basis of increase or decreases of the contract, price, which recommendation was crease of the contract, price, which recommendation was the contract of the contract of the contract of the contract these disputes materially delayed the progress of the work.

these disputes materially delayed the progress of the work.

Il. Scene of the supplemental contracts (finding 9 and 1.5 Seen of the supplemental contracts (finding 9 and 1.5 Seen of the supplemental contracting disputes on the time or later determined by the contracting officer. The extensions so granted totalled 219 days, thus extending the completion date from April 14, 1992, to Newwhole 19, 1995. On Code 5er 2, 1992, pointainff requested the completion of the contract of the supervision of the supervision which we completed on Normber 1, 1992, be engaled with view completed on Normber 1, 1992, be considered as the date of final completion of the contract. This recommendation was adopted. Thin-order the completion date were to the completion of the contract. This recommendation was adopted. Thin-

The defendant's architect, on two occasions, requested plaintiff not to proceed with certain work pertaining to the enclosure wall and the factory building, due to proposed changes in their construction. Plaintiff was not prevented, however, from working on other parts of the project not affected by the proposed changes. It is not proved what damages: if any, resulted from these two incidents.

callages, it any, restored rook trees evo historient.

12. On January 29, 1309, plantial submitted a claim for final settlement to the Comproble General. The Comproble Comproble of the Comproble Comproble of the Comproble of th

The claims discussed in findings 13 to 19, inclusive, were rejected as being unsupported by facts showing that they "were an integral part of the contract," and therefore "not considered as susceptible of administrative interpretation." The claims covered by findings 21 to 25, inclusive, for extras were also recommended for rejection.

# Claim for delay because of changes and errors in dimensions

13. The contract plans for the penitentiary were completed under penseure to get the work started as soon as possible. For this reason the plans were not as thoroughly checked as is cantomy before release to bidders, and, as included in plaintiff's contract, the plans contained many minor discrepancies and errors. On February 21, 1933, the machinet east plaintiff a set of blasprints with some seven hundred insertions made in colored pencil. After a contract the contract of the contract

tracings for the purpose or naving these slueptines made.

In May, 1931, signed a proposed supplemental contract covering the changes placed on the drawings, and carrying no change in contract price and no extension of

contract time. The proposal was not accepted by the defendant, but it submitted instead for plaintiff's approval another proposed form of supplement in which a list of corrections and additional dimensions, fully describing revisions placed on the drawings, was set out. This supplement was promosed by the defendant June 9, 1831, and was

plans.
Plaintiff has introduced expert testimony to the effect that
marked up drawings such as these tend to cause confusion
and delay, but there is no evidence that the drawings caused
confusion or delay on this job. Plaintiff's superintendent
in charge of construction, Walter Landin, was not called
from the use of the plans furnished, and plaintiff has no
proved any delay or resultant damage due to the refusal to

not signed by plaintiff until February 4, 1932. The work, in

Claim for delay in furnishing detail drawings

# 14. Article 2 of the contract provides:

The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided.

#### Paragraph 11 of the specifications provides:

provide new blueprints.

Drawings.—The mechanical drawings are intended to more fully explain the architectural drawings; therefore any thing required by either one or the other shall be furnished and executed the same as though specifically shown on both.

The drawings and specifications shall be considered

as giving the general character and extent of the work. Parts not specifically detailed shall be constructed in a manner and spirit conforming to the class of work required on which the construction of the complete construction of the construction of the construction of the mechanical equipment. When parts only of the building and equipment are shown, the remainder shall be a repetition, and where any detail is activated upon a fewlying it shall in construction of the constructio nished by the architects if required to more fully explain the manner in which the above-mentioned drawings shall be carried out, and the scale and fullsize drawings shall be binding upon the contractor under this contract. Full-size drawings shall take prec-edence over all scale drawings, and any work done in advance of such full-size details shall be at the risk of the contractor. Figured dimensions on all scale drawings shall govern in laving out the work, and no work shall be executed from dimensions obtained by scaling. All drawings and specifications furnished the contractor are the property of the architects and must be returned to him or satisfactorily accounted for before

Copies of drawings and specifications and all details furnished the contractor and of all approved shop drawings shall at all times be in the possession of the contractor's superintendent at the building.

the final certificate for payment is issued.

Soon after work was commenced, the architect wrote plaintiff requesting information regarding the sequence in which it desired detail drawings to be furnished. Such information was not supplied. The architect instructed his superintendent at the site to keep him informed, in advance, of construction progress in order not to delay the work. During the progress of the work, detailed drawings were frequently furnished to plaintiff. At least 400 detailed drawings were so submitted. Plaintiff has not proved any specific damage resulting from delay in furnishing detail drawings.

Delays in submitting details for ornamental face brick

15. On February 21, 1931, the architect forwarded to plaintiff 18 detail drawings, showing development of the exterior brickwork. They were not completed drawings for construction purposes, but were furnished in order to expedite the letting of subcontracts for certain brick. Plaintiff objected to furnishing the large number of special shaped brick which the architect had shown on his detail drawings. Plaintiff contended that the specifications required only 15 shapes to be furnished for the entire project. Certain paragraphs of this specification provided the following:

Reporter's Statement of the Case

64. Face brick.—Face brick shall be a soft mud sand mould brick made in wooden moulds overburned to such a degree as to form blotches of iron coming out on the face and other parts of the brick in a clinker form.

Contractor shall allow \$28.00 per M for brick FOB cars, Lewisburg, Penna.

Special shaped brick matching the face brick in color and texture shall be provided wherever special shapes

and texture shall be provided wherever special shapes are necessary. Face brick for arches and pattern work shall be shaped to provide regular soffits and joints of uniform or radial widths as the nature of the work may require.

may require.

All face brick to be laid with 3g" joints and unevenly
as to course jointing as specified for block. Joints are
to be flush struck or weathered as determined by the
architect.

architic added brick.—All modded brick shown, incluring corner blocks, are to be specially made in the same clay as the bricks. These special bricks are to be made in a large size as the clay will burn without too much varping. Some warping of the special brick too mach varping. Some warping of the special brick too that the brick shall be rough, that the special brick shall also be rough as well as the terra cotta. The contractor shall figure on 16 different shaped special brick than the special brick shall be roughed brick than the special brick than the special brick shall be roughed to the special brick than the special brick shall be roughed to the special brick shall be special brick than the special brick than the

# brick mould. Paragraph 20 of the specifications provided:

check up all plains and specifications immediately upon heir receipt and prior to his estimating and to call the point which may not be entirely clear to him. If there point which may not be entirely clear to him. If there should be two ways shown on the plans, or two possible the contractor is to make no decision himself but is of refer the matter to the architect. The burden is hereby that the plans are the plans have been allowed as intent of the plans and appendications is if he does not understand them as drawn.

20. Clarity of plans.-The contractor shall carefully

intent of the plans and specimentons is in the does not understand them as drawn.

If there is a lack of clarity in the plans and specifications or if any part of either plans or specifications seem to conflict with any part of either one or the other of them, the contractor must call the architect's attention to the same at the time of his estimating them before he submits his bid for a ruling. If he submits his Bottoms Reporter's Statement of the Case

Bid without ruising any question as to any ambiguity either in the plans or the specifications, then the ruling of the architect as to the true intent and meaning of the plans and specifications shall be final.

The architect ruled that poragraph 65 of the specifications referred to commental string course brick only, that paragraph 64 of the specifications provided for the use of shaped brick wherever special shapes are necessary as indicated on the contract plans. Plaintiff refused to accept this ruling of the architect. Subsequently, as a result of a conference, it was agreed that 29 shapes of brick were to be furnished by plaintiff. On April 15, 1814, the architect submitted revised brick details to plaintiff in conformity contract for free and shared brick on May 12, 1813.

On May 29, 1931, the architect forwarded to plaintiff completed brick details for construction purposes. The laying of brick began on August 5, 1981.

We do not find that the defendant was at fault in the disagreement relating to the number of shapes of brick.

#### Delay, return of shop drawings

## 16. Paragraph 22 of the specifications reads:

Shop drawnings—All shop drawnings are to be made in triplicate and sent first to the general contractor who will check these over for all dimensions and be entirely will check these over for all dimensions and be entirely expected. The contract of the co

It is not proved whether or not plaintiff checked shop drawings submitted by subcontractors as it agreed to do the foregoing paragraph. When plaintiff forwarded the shop drawings to the architect, no notations or corrections appeared on them to show that plaintiff had checked them and the architect assumed that it had not. The architect accordingly undertook this work and acted upon shop - 4

drawings, either approving them or returning them for correction. Plaintiff's practice caused the architect to devote more time to checking shop drawings than would have been necessary if plaintiff had made clear to the architect that it had checked them.

The architect kept a ledger record showing the dates of submission, rejection, and approval of all shop drawings, which indicates that he was returning shop drawings with reasonable promptness. About 1,800 shop drawings were submitted to the architect for approval, many of which were submitted directly to the architect instead of having been first submitted by the subcontractors to binarity.

We do not find that the architect was unreasonably slow in checking and returning slop drawings.

## Delay, hospital equipment contract

17. The specifications provided that the defendant should purchase, under sparate contract, certain of the hospital electrical and hitchen equipment. Plaintiff's contract product of the contract product product

## Delay, hardware award

18. The specifications indicated that certain finished hardware was to be furnished by the defendant, but the allowance for the same did not include all the hardware to be used on the job. Paragraphs 276 and 276 (a) of the specifications provided as follows:

276. Hardware.—Contractor is to allow \$32,500.00 for hardware allowance, for hardware FOB Lewisburg, Pa.

Contractor is to baul to job and set all hardware, but this is not included in the hardware allowane.

(a) Hardware to be carefully protected. The Hardware under hardware allowane does not include hardware for windows, all iron grilles, glass and metal partitions, and Disciplinary Building cell block doors, or rough hardware. All such hardware is specified to be work.

Because it is customary to install finished hardware near the completion of a job, it was not necessary for the hardware to be furnished until late in the work of construction. However, plantiff should have been furnished a hardware schedule showing the kind of hardware to be applied, together with templates, or models of the hardware, for metal doors and frames, in order that the manufacture of such nearl work might make provisions for the type of hardware later to be installed. There is testimony that because of dealy by the settlects in furnishing template information, dealy by the settlects in furnishing template information, dealy by the settlects in furnishing template information, down, or the time, occ, of selder involved in sace lower.

#### Other delays

10. Pleintiff claims that the defendant made charges which were sortified the expoper disc contract; that it had proposed changes under consideration an unreasonable proposed changes under consideration an unreasonable the work, causing phintiff increased expense. The changes complained of include the reduction of ornamentation, the redesign of the entrances gets building, the dediction of first stairs in the buildings, the lovering of florings in the ness change in the type of factory. Pleintid rigned in supplemental contracts to make those changes, as well as all other changes and where extra work or material even reasonary, it can be considered to the contract of the cont

mate amount of damage resulted from any of the changes.

There is evidence that plaintiff was itself dilatory on occasions in responding to the defendant's invitations to submit

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Reporter's Statement of the Case proposals for changes, but there is no proof that its conduct in that regard delayed the progress of the work in any ascertainable amount.

#### Increased costs

20. The amount of increased costs claimed as a result of the defendant's alleged delay and interference is \$985,949.90.
II represents the total of the claimed increased field construction costs, seclusive of material permanently incorporated in the structure, but including overhead costs, as setting that the properties of th

tion list, in the first column, forty-seven items, specifying the branches of construction considered. Opposite each branch are columns listing "actual cost," "reasonable cost," and "increase," Then by adding "office overhead" and "10% profit", plaintiff arrived at its "total increased cost", In its brief plaintiff abandons its claim to 10% profit on these items. Plaintiff contends that delays by the defendant during the course of construction increased its costs in these several branches of construction. However, plaintiff's testimony regarding the length of these delays, as well as the damages resulting therefrom, is indefinite. As to many alleged causes of delay, no evidence was offered to show that they did in fact cause delay, or what financial harm resulted, Plaintiff offered five witnesses, all of whom were experienced builders, and one of whom was president of plaintiff company, as experts, in support of the unit prices set forth in its petition as "reasonable cost." Defendant produced witnesses as to the reasonable unit prices for doing the work by branches as listed in plaintiff's petition. Its witnesses were estimators for builders, who had spent several weeks studying the plans and specifications for this project in preparation for submitting a bid thereon. They had available their original estimates on which they had based their bids, submitted in competition with plaintiff's bid for doing this work. They testified that the reasonable cost figures claimed by plaintiff were much too low.

449973-42-CC-vol. 95-33

95 C. Cls.

Reporter's Statement of the Con-Plaintiff was not compelled to hire a derrick from Pittsburgh solely to lift steel beams into the kitchen area because it was delayed by the defendant in the scheduled performance of its work, as it charges. Plaintiff hired the derrick from Pittsburgh, partly at least, to place steel beams in the roof of the auditorium, having no other derrick available and adequate for the work.

# Temporary heat and winter protection

## 21. Article 10 of the contract provides:

(1) Permits and care of work.—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

#### Paragraph 33 of the specifications provides: Water, heat and light.-The contractor shall furnish

at his own expense, all water, light, power and heat required for the carrying out of his work and the work of all subcontractors. Temporary electrical work shall conform to the regulations of the National Board of Fire Underwriters.

The contracting officer did not order plaintiff to provide either temporary heat or winter protection as an extra. Plaintiff was refused a supplemental contract intended to provide additional compensation for furnishing temporary heat

Several supplemental contracts, relating to changes or extras, increased plaintiff's compensation and extended the time for completion. The evidence does not show to what extent, if any, the defendant wrongfully caused delay in the work during the spring and summer of 1931.

#### Moulded brick in entrance building

22. It is plaintiff's contention that there were 7.578 units of special moulded brick left unused at the site upon completion of the work, for which plaintiff could make no adjustment with the manufacturer. Plaintiff's claim for this item is based on a clause in supplemental contract 93, accepted August 14, 1832, providing for a reduction in the size of the Entrance Gate Building. That clause reads as follows:

The right is reserved to claim additional compensation under this supplement providing it is found impossible to cancel approximately 51,000 face brick and 11,000 moulded brick required by the contract plans, but not needed for the revised building as covered by this supplement; such claim as presented to be in acordance with the Treasury Department's memorandum dated May 20, 1982, copy attached hereto.

The manufacture of the moulded brick for the Entrans data Building was started on June 17, 1093, at which time the brick manufacturer had the revised approved drawing calling for the smaller building, as provided by supplemental contract 60, and he fabricated the brick accordingly. The brick manufacturer was paid only for brick accordingly released and shipped to the job. He sunt chocken to the beautiful contract of the contract of the contract of the beautiful contract of the contract of the contract of the beautiful contract of the contract of the contract of the theory of the agreement above quote of the contract of the contr

#### Emergency surcharge on freight

23. On January 4, 1982, an additional tariff went into effect, which consisted of an emergency surcharge on freight rates. Plaintiff claims that it should be paid the amount of the additional charge by the defendant on the theory that all material on which the increased tariff was paid would have been delivered to the site prior to January 4, 1982, had plaintiff not been held up by delays which plaintiff claims were due to the defendant.

Plaintiff claims the amount of \$3,008.58 for this item. Of this amount, the sum of \$804.79 was charged against subcontractors involved, who paid it. Plaintiff has added 10% overhead and 10% profit to this sum, making a total of \$804.88, which was not naid by it.

It appears that there is a duplication of charges between this item of plaintiffs claim and the item of "extra terra cotta copings," which appears as item No. 7 in Finding 7, supra. This duplication consists of charges of 40 cents per ton on all terra cotta shipped after January 4, 1982. Plaintiff has included this charge in both claims.

## Extra bulk excavation

24. Paragraph 54 of the specifications contained the following provision:

The contractor is to estimate on all excavating and fill as shown by grade lines and floor lines on the plans. If there is any variation in the amount of excavation and filling at the site over and above what is called for by the plans this will be adjusted, but the contractor must make any claims for extra digging before he starts his work.

On March 18, 1881, plaintiff, in a letter to the defendant's architect, stated that there were differences in grade levels from those shown on the plans and claimed as additional compensation, the sum of \$6,395.00, for the excavation of 14,464 cubic yards of earth.

Mr. Walter Frick, a surveyor residing at Lewisburg, Pa., at the request of a representative of the contracting officer, made a check of the additional bulk excavation required over and above that shown on the plans. He reported the extra amount of excavation to be 8,485-20 cubic yards.

On July 11, 1931, plaintiff wrote the architect regarding supplemental contract No. 4 for the revision of the Enclosure Wall. Plaintiff stated that it was including the loss for change to contract the contract of the contract plaintiff instructing it to proceed with the construction of the enclosure wall. On July 38, 1931, an order was sent to plaintiff instructing it to proceed with the construction of the enclosure wall, pending an agreement as to the amount of additional compensation. The order to proceed read of additional compensation. The order to proceed read

In no event will you be allowed in excess of \$36,-326.31 for the work involved, which includes all adReporter's Statement of the Case

justments for additional excavation because of discrepancies in the original topographical surveys.

The parties were unable to reach an agreement as to the amount of additional compensation due plaintiff for the revision of the enclosure wall, whereupon both the architect and plaintiff submitted detailed estimates to the Supervising Architect of the Tressury Department, for decision. The architect's estimator set forth the extra for hulk excavation as follows:

Excavation-Add. 8,845 cu. yds. at 34#\_\_\_\_\_\_\$3,007.80 Correcting contour plans.

Based on Frick report of May 27, 1931.

Plaintiff's estimator, in his estimate, set forth the extra for bulk excavation as follows:

Item K. 

Note K—this is a complete amount which was submitted in previous correspondence for change in contour of original site which was submitted in letter of March 18th, and the Great Lakes Construction Company was ordered by Mr. Sanford Batus to proceed with work in letter of March 25, The Supervising Architect of the Treasury Department, in deciding the amount of compensation to be allowed for

revision of the enclosure wall, considered this item of extra bulk excavation due to the change in grade, and in his estimate, allowed additional compensation therefor as follows:

Change in grade, approximately 10,000 cubic yards at 50¢ per cubic yard .....

Added to this amount was 10% overhead and 10% profit, making a total of \$6,050,00. The Supervising Architect's lump sum estimate of \$18,988.00, which included this item of change in grade, was allowed plaintiff under the provisions of supplemental contract No. 44, without reduction. On September 11, 1931, defendant's architect wrote the Bureau of Prisons commenting on this estimate made by the Supervising Architect, as follows:

ITEM 27. This is for the additional excavation required at the job over that shown by the contract drawings. The contractor in your presence and mine agreed to accept Mr. Frick's estimate of this. Mr. Frick's estimate of the increased yardage is 8,845.

Plaintiff has been allowed \$8,0000 for extra bulk excavation claimed in its letter of March 18, 1931, under the provisions of supplemental contract No. 44. The estimator of the Supervising Architect's office, who recommended to the contracting officer approval of plaintiff's claim made to the Compreller General (see finding 12) in the amount of \$8,555.00, testified that such approval was given in serior. The contracting officer's representative who complete the adversariation of the comprehension of the complete of the adventure of the complete of the

The figure of \$18,988.00 which the parties agreed to as the price for the performance of Supplement No. 44 was arrived at as a result of an error in computation, made by the defendant. The figure should have been \$20,198.53.

excavation in Supplement No. 44.

#### Additional sidewalks

25. The contracting officer disapproved this claim. A dispute arose between plaintiff and the architect while work was being done, regarding certain sidewalks, and what the contract requirements were concerning them. The dispute concerned two sidewalks; one was installed east of cell block B and guards' dining room, and the other was located west of dormitory D and the laundry building. The architect, construing paragraph 20 (see finding 15) of the specifications, ruled that both sidewalks were clearly shown on contract drawing No. 3, and were required to be furnished thereunder. The architect permitted plaintiff to install the cheanest type of sidewalks. Plaintiff appealed from the architect's decision to the contracting officer's representative, and by mutual agreement the question was referred to the Supervising Architect of the Treasury Department, who sustained the architect's ruling, holding, "From a review of the drawings it is evident that walks of some type are required by the contract."

We find that plaintiff was required by the contract to construct the two sidewalks as it did construct them.

#### Opinion of the Court

The court decided that the plaintiff was entitled to recover only for the items in its petition, as modified by statements in its brief, not contested by defendant.

Madden, Judge, delivered the opinion of the court:

Plaintif sue for various alleged breaches by the defendant of a contract between the parties for the construction of a Federal Penitentiary, near Lewisburg, Pennsylvania. The alleged breaches consist of extract ordered and not paid for and of delays in the progress of the work caused by the defendant and resulting in extra costs to plaintiff. As to a number of the alleged extras ordered and not paid for, and does not contact in thallity.

The contract was entered into January 31, 1831, as a result of competitive bidding after advertisement. The contract provided that the work should be completed within 420 days from the receipt by the contractor of notice to proceed. That notice was given on February 14, 1831, than faing the completion date as April 13, 1962. The project was a large one, the contract ravie being 82,781,800,00.

The defendant needed the new penitentiary urgently, in the opinion of its officers, and the preparation of the plans and specifications by the defendant's architect for submission to bidders had been done in less than the usual time, They therefore omitted a good many dimensional figures and details which were later supplied. The omissions were obvious and the bidders, including plaintiff, the successful bidder, seem to have been able to make their estimates in spite of these omissions. On February 21, 1931, shortly after the contract was made, the architect supplied plaintiff a set of blueprints with these additions as well as corrections of errors which had been discovered, made with a colored pencil. There were some seven hundred of these insertions. Others were later made in other colors. Thereupon began an argument which extended through some months, the work going forward meanwhile with the corrected plans, as to whether the defendant or the architect should not supply plaintiff with a new clean set of blueprints containing all the insertions. Finally the defendant refused to release the Opinies of the Court
original tracings necessary for new blueprints, and they
were never made.

were never made.
Plaintiff introduced much revience as to these additions.
Plaintiff introduced much revience new prints made. Expert builders testified on plaintiff is behalf that plans marked up in this manner would tend to cause confusion and delay.
There is no evidence, however, that the condition of the plans did cause misunderstanding, confusion, or delay in the work. Indeed, Walter Landin, plaintiff's superintendent at the job whoes repossibility it was to interpret the plans and see the building constructed accordingly, was not called as seen that the contract of the host of the contract of the host of

The defendant made a good many changes in the plans, as distinguished from the insertions discussed above, as the work progressed. Among the largest of these were the following: ornamentation was eliminated; the size of the entrance gate building was reduced; numerous stairways to make the buildings safer from the hazards of fire were added: the type of the factory building was changed. When the defendant proposed a change, as it had a right to do under Article 3 of the contract, plaintiff was invited to make an offer of the reduction in price it would permit or the increase it would ask because of the change. There were frequent and substantial disagreements between plaintiff and the architect about these figures, but in all except three cases they bargained to an agreed figure, or, with the consent of both parties, a figure or basis of determination was set by the supervising architect in the Treasury Department, which was embodied in a supplemental contract. In the three exceptional cases the contracting officer finally set a price, and plaintiff made no protest. Extensions of time were granted, as agreed upon, when these modifications were made. The net total additions to the contract price resulting from these modifications was \$157,598,97, and the extensions of time moved the completion date forward from April 14. 1932, to November 19, 1932. The project was in fact completed and finally inspected on November 7, 1932.

# Opinion of the Court

Plainiff claims that these agreed additions to the contract price took on account of anything more than the actual additional cost, with overhead and profit, of doing the additional work; that they provided no componention of the contract of the contract of the contract of the caused by the agreed change and the time it took to contract or it and to execute it. In signific the modification agreements, plainiff tool defendant's agents ocally that it was agoing to claim damages for delay, but some 29 out of 100 supplements contained a clause inserted by the defendant to the effect that no dramages would be claimed for delay.

Since the contract expréssify permits the obtendant to make changes and the plaintiff to be compensated therefor as agreed, we think the kind of supplemental agreement contemplated by the contract is one which have an further contemplated by the contract is one which have no further than the contemplate of the contemplate of the contemplate that the contemplate is the contemplate of the day or the dumage.

Plaintiff's theory of proof and recovery as to the largest item of its claim is, in general, as follows. It has sought to show that the blueprints were not in the form approved by good usage, but were in a condition which would tend to cause confusion and delay. It has proved that numerous changes were made by the defendant in the project in the course of construction, and time was consumed in the settling of these changes; that some mistakes were made in the specifications which mistakes had to be corrected before the building could be built. It has presented evidence intended to show that the architect was more artistic than practical, and was difficult to get on with. Having presented this evidence tending to show fault on the part of the defendant, it then presented evidence showing what its actual construction costs were in each branch of its work. according to a table set out in its petition, and the total of such costs, amounting to \$535,758.19. It then presented as witnesses several experienced builders, including plaintiff's president, one or more of whom testified with reference to each branch of the work that its cost under proper and usual

Oninian of the Court conditions at the time and place should not have been more than a named figure.1 The total of these figures is \$271,-077.34. It then points to the difference between the actual costs and the alleged proper costs and says, "This difference, which with office overhead amounts to \$285,249.59, is the damage caused by the inadequate blueprints, the numerous change orders, the errors in the specifications. the unreasonableness of the architect, and the rest of defendant's conduct here complained of."

Plaintiff seeks to recover under this blanket proof without proving the fact that any one or more of the asserted faults of the defendant caused any specific delay or any, even estimated, amount of damage.

We recognize and have recently applied the doctrine that if we find that a plaintiff has been legally wronged, a certain unavoidable indefiniteness in the proof as to just how much money it would take to compensate him for the wrong will not prevent a recovery of a sum which the court concludes will fairly approximate that compensation.\* That doctrine is not applicable here because neither the particular alleged faults of the defendant, nor the sum of all of them, constituted a legal wrong to plaintiff unless they caused damage. That the blueprints from which the building was built were not in conventional order: that the architect was artistic and difficult; that a good many changes were made in the plans of the building, the contract expressly giving the defendant the privilege of making changes; that the defendant was, in some cases, dilatory in finally approving changes; none of these things, even if we regarded them as proved, would constitute actionable breaches of implied terms of the contract here in suit unless they at least substantially harmed plaintiff. But there is no tangible evidence that they harmed plaintiff except the general testimony that the reasonable construction cost on the several branches of the work, and on the whole of it,

reasonable cost figures.

<sup>1</sup> Witnesses for the defendant, estimators for builders who had bid on the ich, but whose bids were higher than plaintiff's, testified to "reasonable cost" figures much higher in many branches, and in the aggregate, than plaintiff's

<sup>\*</sup>F. Monefield & Sons Co. v. United States, 94 C. Cir. 397.

should have been not more than a named figure. There is no satisfactory evidence, and scarcely even an attempt to no satisfactory evidence, and scarcely even an attempt to show, that because of certain specified conduct on the part of the defendant, certain work of plaintiff was delayed by a certain number of days, keeping men and machines idle, or otherwise harming plaintiff by an amount capable of even autoronimate, measurement.

We note here again the failure of plaintiff to produce its continution unspirationed whose job is was to keep the work going forward for plaintiff. He is the one who would have known what delays were caused, and whether and how they were harmful. The architect's superintendent, who was also constantly on the job, testified that work which was otherwise ready to be done was not substratially delayed for the reasons charged. In this condition of the evidence, we cannot find that plaintiff was delayed and the evidence, we cannot find that plaintiff was delayed and allowed wroneful conduct.

Plaintiff is entitled to recover a total of \$50,418.25, made

Correction in screens	\$121.
Connecting kitchen equipment	
Enclosure wall extras	
Extra terra cotta copings	9, 527.
Extra cinders	8, 827.
Added hospital equipment	387.
Added stack work	450.
Supp. 70 (70 A)	47.
Supp. 44	20, 198.
Balance due on contract	1, 277.

50, 413, 25

It is so ordered.

Jones, Judge; Littleton, Judge; and Whaley, Chief Justice, concur.

Justice, concur.

WHITAKER, Judge, took no part in the decision of this case.

# CASSIDY & GALLAGHER, INC., v. THE UNITED STATES

# [No. 43704. Decided February 2, 1942]

# On the Proofs Geogrammat contract: inspection of site by contractor: extra ex-

pense—Where plaintiff, a contractor, entered into a contract with the Government for the exection and completion of one set of five special salection steel radio mants with concrete foundations, and where below samulating its boll plaintiff inspected the site; and where plaintiff agreed to a change of site with no increase or decrease in price; and where in convanting for foundations water was struck, necessitating additional expense; it had date plaintiff is not entitled to recover.

Same.—The Government made no representations as to conditions at the sits other than as disclosed by the proposal conditions the specifications and other contract provisions; there was no concalment, no withholding of information and consequently no reliance.

Same.—The plaintiff's method of meeting the conditions encountered was inefficient and not in accord with good engineering practice.

The Reporter's statement of the case:

Mr. Edward Gallagher for the plaintiff.

Mr. Henry Fischer, with whom was Mr. Assistant Attorney General Francis M. Shea for the defendant. Mr. Newell A. Clapp was on the brief.

The court made special findings of fact as follows:

I. Phintiff is a corporation organized and existing under the laws of the State of New York, having its principal offices at Albany, New York. On July 34, 1984, it entered into a written contract with the defendant, whereby the plaintiff agreed to furnish all labor and materials, and parform all work required for the section, writing and painting, etc., complete, of one set of five 122-tt. special selector neter land mast with concrete foundations, etc., for the consideration of \$4,850.00, plus such additional work and materials as might be required and estually. The work was to be commond within 10 days from recipit of notice to proceed or the effective state thereof, and be completed within 45 calendar days from receipt of notice to proceed or the effective date thereof.

to proceed or the effective date thereof.

2. Notice to proceed was received by the plaintiff October

 1, 1934.
 Receipt of the notice October 1, 1934, placed the date for completion as not later than November 15, 1934. The work was actually completed December 14, 1934, a delay of

29 days.
3. Plantiff's representative visited the site of the work before the bidding. About 100 feet north of the proposed location of the towers ran a small stream. Surrounding the site was an abundant crowth of vecetation including

trees.
4. On August 22, 1934, the contracting officer sent the following change order to the contractor:

With reference to the proposed contract based on Proposal 3371B or the erection, wiring, painting, etc., of steel radio masts near Albany, it is the desire of this edifice that the site of the work be changed as indicated on the inclosed drawings RB-1046 and 1046A. RB-1046 shows the location which was intended at the time bids were obtained, and 1046A the location which we propose to use. You will note that the new location

is about 192 feet southerly and 32 feet westerly from the original location. This letter is being sent you in quadruplicate with request that you execute and return three signed copies to this office, retaining the fourth for your files if

desired.

The plaintiff endorsed the order at the foot thereof as

follows:

In reference to the above, we hereby agree to the

change in site as indicated with no increase or decrease in contract price or contract time.

This change in location had the effect of placing the

This change in location had the effect of placing the towers more nearly on the same level, as well as on higher ground and farther away from the stream.

5. After receipt of notice to proceed plaintiff began operations. In excavating for the foundations for four of the towers the plaintiff struck water about two feet below the top soil; at the fifth site conditions were not so bad. On October 13, 1984, plaintiff protested against performing the work at the agreed price and in the agreed time under the conditions thus encountered, set forth the situation and demanded of the contracting officer an extension of time and reimbursement for additional labor and material.

George E. Stratton, Airways Engineer, for the Assistant Director, Bureau of Air Commerce, Department of Commerce, responded to this demand by letter dated October 20, 1834, as follows:

We are in receipt of your letter of October 13, reporting the difficulties of excavating for the tower bases at Albany in connection with your contract of July 24, 1934, contract No. Cba 241. It will not be possible for us to grant you an extension of time nor additional compensation because of these unforseen subsurface conditions inasmuch as the proposal on which bids were obtained particularly specified that bidders must familiarize themselves with local conditions and make their own estimates of the difficulties attending the execution of the contract, including subsurface conditions. See paragraph 17 of the proposal conditions forming a part of the contract. The contract also specifically provides in paragraph 6 (c) of specification No. 743 that "no additional compensation will be allowed on account of any excavation or backfill being wet or frozen."

There is no proof that at the time the contract was entered into or before the work was commenced the defendant was in possession of knowledge concerning subsurface conditions not also known to the plaintiff.

6. November 6, 1934, the plaintiff in letter to the contracting officer set forth its claim as follows:

We are in receipt of your letter of October 20th and are surprised that you do not think we are entitled to an extension of time and compensation for additional labor and material. Apparently you are unaware of the true conditions.

When we submitted our proposal to you, we naturally expected the work to be started within a reasonable time, but the record will show that it was months after we submitted our proposal and weeks after we furnished a bond that we were allowed to start work on our contract. It took you ten or twelve weeks to

Reporter's Statement of the Case

clear the site when it should have been done in onethird of the time. The length of time it took does not concern us except for the fact that it forced us to do our work in the rainy part of the fall season. Fulfilling our contract at this time cost us more money and took more time. We believe we are entitled to an extension of time for this reason alone.

extension of time for this reason alone. When you say that the apecification overs the condisages with you. We read the specification and carried out to meaning. We spent a whole day inspecting the sate to be considered as closely as party to the considered to the condition of the condition of the considered to the condition of the condition of the concept of the condition of the condition of the converse conditions at the site. We found no indication of water anywhere. We still believe that you should have advised bidders as to the read conditions. In clearing the site, you evidently found conditions different from that you evidently found conditions different from that you existed because you changed the original

We believe we are entitled to an extra. It certainly is an unusual condition when it was necessary for us to use a steam shorel and a gas water pump in order to to use a steam shorel and a gas water pump in order to excavate for concrete bases of such small dimensions. We had to pump from thirty to fifty thousand (30,000-00,000) gallons of water out of the eacavation every morning. Your engineer's time report will also show its description of the contract of the work, besides the cost of equipment.

We have been forced to suffer a financial loss due to an oversight of your office and we intend to take what steps are necessary to get fair treatment.

7. August 28, 1935, the contracting officer wrote to the plaintiff as follows:

The Bursau is preparing a report to the Secretary of Commerce on your claim for extra compensation under Contract Cha-241 for the servicion, wiring and painting the Contract Cha-241 for the servicion, wiring and painting the contract Cha-250 for the service of the Contract Charles of the Charles of the

Repatric's Statument of the Care
It will be necessary for us to have ready for inclosure
also a release signed by your company as required by
release signed by your company as required by
release to the contract. We have, therefore,
prepared a release for the undisputed amount of
\$2,525,00, and we have included therein an exception
\$2,525,00, and we have included therein an exception
and the hirs of equipment due to substrate conditions
it is requised that you execute and return three copies
of this release. You may retain the fourth copy for
of this release. You may retain the fourth copy for

The wooder, your certified datement of facts, and the analysis of your storneys, which were received by the Bureau with the letter of August 2 from O'Connell & Aronowitz addressed to the office of Congressman Parker Corning, were not accompanied by your itemized statements showing the method of arriving at the quested that those statements be inclosed with your reply forwarding the release.

It is suggested that you give the matter immediate attention inasmuch as the papers cannot be forwarded to the General Accounting Office until the release and itemized statements have been received.

 The presence of water necessitated additional expense above what the cost would have been for dry excavation.
 The additional expense incurred was \$2,267.50 (including profit of \$206.14).

The plaintiff's method of meeting this condition was inefficient and not in accord with good engineering practices. All that was necessary was to dig K-dabped trendes, approxipation of the control of the control of the control of the control plaintiff used a chambell and proceeds to dig circles 30 to 35 feet in diameter for each tower. This method required repeated and much more extensive purprisipe than would have been recessary had proper methods been employed, and also been recessary had proper methods been employed, and also concrete footings use the executations as form work for the concrete footings.

There is no proof that the Government withheld any amount for liquidated damages for delay. Opinion of the Court
The court decided that the plaintiff was not entitled to

recover.

JONES, Judge, delivered the opinion of the court:

Plaintiff seeks recovery of excess costs incurred in completing a contract with the Government.

The contract called for the construction of five steel radio masts, 125 feet in height, with concrete foundations, near Albany, New York.

Albany, New York.

The contract price was \$4,639.00. The structures were to be completed within 45 days after receipt of notice to proceed.

The plaintiff asserts that it encountered unforeseen difficulties in the way of subsurface water conditions which made it necessary to expend \$2,267.50 for labor and materials above the amount originally contemplated.

For this sum it sues, together with \$180.00 which it claims was wrongfully charged against the contract as liquidated damages for delay in completing the work.

The contract was signed July 24, 1934. The site was covered with trees and undergrowth. These were cleared by defendant and notice to proceed was given plaintiff October I. 1834.

1, 1898.
Plaintiff's representative visited the site before the bidding. A small stream ran about 100 feet north of the location. Defendant's witness, the supervising engineer, testified that a swamp was located on the site, with dense undergrowth and a small pool of water. Plaintiff admitted the presence

of trees and undergrowth, but denied that there was any swamp or pool of water on the premises at the time its representative made the inspection. No borings were made by either plaintiff or defendant.

In making excavations for four of the towers the plaintiff struck water near the surface, requiring more labor and

tiff struck water near the surface, requiring more labor and material than would have been necessary had such water not been encountered.

Plaintiff claims compensation under Article 4 of the contract which provides for adjustment should the contractor encounter, or the Government discover, during the progress of the work, subsurface or latent conditions at the site materially differing from those shown on the drawings or indi-

The invitation to bid contained certain proposal conditions, among which was a provision that bidders were expected to familiarize themselves with local conditions and make their own estimates of the difficulties attending the execution of the proposed contract including "subsurface conditions and all other contineencies."

The specifications, which were a part of the contract, contain the following:

5 (b) Payment for excavation, sheeting, shoring, pumping, bailing, draining, backfilling, levelling, etc., shall be included in the prices bid in the schedule for the complete work; \* \* \*

6 (c) No additional compensation will be allowed on account of any excavation or backfill being wet or frozen. 7 (c) In case of soft soil, or for other reasons, the contracting officer may order in writing (or by telegraph) that foundations be carried more than the minimum depth.

Other than as disclosed by the proposal conditions, the specifications and other contract provisions, the Government made no representations as to conditions at the site. There was no concealment, no witholding of information, and consequently no reliance.

Of the three specification provisions above quoted 7 (c) is the only one that mentions changes in specification requirements that might call for the application of Article 4 of the contract. It provided that the contracting officer, on account of soft soil or for other reasons, should have the right to

<sup>1</sup> Agr. 4. Changed conditions.—Should be cuttarter encounter, or the lorement discrete during the purpose of he work, shouldness of city labout removable discrete during the purpose of he work, shouldness of city labout bedienced in the specifications, the strengths of the contracting officer shall be bedienced in the specifications, in such conditions better they are districted. The contraction of the contracting officer shall be supposed to the specific shall be such conditions of the specific shall be such conditions of the specific shall be such as can be suffered to the specific shall be shall as one, with the writers approved the based of the specification as he may find accountry, and any increase or decrease of contract (or) difference in this recentific means on changes shall be subsided as

<sup>1-</sup>Trimmunt Dredging Co. v. United States, 80 C. Cla. 559, 574; General Contracting Corporation v. United States, 88 C. Cla. 215, 248; Blakeslee & Sons, Inc. v. United States, 89 C. Cla. 228, 250; James Stewart & Co., Inc. v. United States, 94 C. Cla. 55.

504

Opinion of the Court
order foundations carried to more than the minimum depth.
No such order was issued.

The fact that the way is left open for adjustments under 7 (c) while conditions set out in specifications 5 (h) and 6 (c) are affirmatively included within the prices bid strongly indicates that the conditions plaintiff complains of were included in his undertaking. (See above.)

While plaintiff was required to do more work than he evidently thought he would be called upon to do, he was given full opportunity to find out the facts. Nothing was

given full opportunity to find out the facts. Nothing was withheld from him. The nearby stream was visible, as were the trees and undergrowth. He visited the site. He made such inspection as he saw fit. The specifications called for the meeting of certain conditions. With these facts before him he entered into the contract.

Plainiff contends that he encountered extraordinary subsurface and latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications. The record as a whole does not justify this contention. Both the surface conditions at the site and the wording of subsurface conditions likely to be encountered. However, it is not necessary to decide this question since the contracting officer ruied adversely on the claim for additional costs and specifically declined to grant the same in a latter deaded October 1964. The plainist food no uppeal from this decides to the contract.

Even if plaintiff were otherwise entitled to recover, we do not think the evidence shows what additional expense was necessary. The actual expense was set out, but the evidence reveals that plaintiff used a far more expensive method than good engineering practice required.

The foundations were X-shaped, approximately 21/2 by 10 feet.

The supervising engineer suggested to plaintiff that by making this type of excavation much less work and expense would be involved; that it would not be necessary "to form the foundations below the ground surface because the shoring would act as the form," and that this would require far less numning and bailing than the method used. Instead, the plaintiff, upon recommendation of a subcontractor, revted a classible I (owned by the subcontractor) at the contractor, revted a classible II (owned by the subcontractor) at for each tower. I was necessary to may be a dead of an addition at all the way to the subgrade depth, again empty the exeavated area to set the reinforcing steel, and again empty the exeavation in order to pour the concrete. It was necessary to move the pump from one location to another and move it back again for the next pumping. Much of this moves the subcontraction of the contraction of the subcontraction of the subcontrac

The defendant should not be held responsible for a method that was far more cumbersome and expensive than necessary. The record fails to show what outlay would have been necessary had the proper method been used, only that it would have been much less expensive and would have called for less operating time.

In the circumstances the proof of extra necessary cost is unsatisfactory, even though defendant's liability were conceded.

The record does not disclose whether defendant withheld any amount for liquidated damages on account of the delay in completing the contract. In this state of the record no recovery can be had for this item.

It follows that the petition must be dismissed.

It is so ordered.

Madden, Judge; Littleton, Judge; and Whalex, Chief Justice. concur.

Whitaker, Judge, took no part in the decision of this case.

# MAX J. KUNEY v. THE UNITED STATES

[No. 43972. Decided February 2, 1942]

On the Proofs

Goernment contract; siciny and carra expense coused by defendant.
Where, in response to advertisement by the Procurement by
sion of the Treasury for bids for the furnishing of a rockcrucking plant on an bourty basis and in the alternative on a
cubic-yard basis, plaintiff, a contractor, submitted bids, which
were accepted: and where upon inquiry plaintiff was related.

Reserves Estament of the Cuts of the Cuts of the Cuts of the Cuts of the World Serves and the World Serves Administration, who informed pislatiff that the Cuts of the Cuts of

that plaintif is accordingly entitled to recover.

Bent acceptione of his drate rigidated date; performance of sord.

When the property of the

Same; renessed of contract recognition of its terms.—Where the work was not completed within the specified time; and where, thereupon, defendant presented to plaintiff a renewal of the contract which plaintiff accepted; it is held that this "renewal" was a recognition of the original contract.

Same; implied condition.—It was an implied condition of the contract that defendant would not delay plaintiff in the performance of the work.

The Reporter's statement of the case:

Mr. Herman J. Galloway for the plaintiff. King & King were on the brief.

Mr. E. L. Metzler, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff, Max J. Kuney, a citizen of the United States residing in Spokane, Washington, was engaged in the construction and contracting business in 1886, doing business under the name of Max J. Kuney Company, with his principal place of business in Spokane, Washington. He was and is now owner of the Max J. Kuney Company.

 Under date of April 3, 1936, the Procurement Division of the Treasury Department invited bids directed to the procurement of crushed stone to be furnished the Works Progress Administration, which show he must be used in connecting the surface of the surface of

The quarry is to be furnished by Spokane County, and is located three (3) miles southeast of Spokane one-half (1/2) mile from the center line of the Palouse Highway.

The bid was to be submitted in alternative form, both

on an hourly rental basis for the plant and equipment and at a unit price per cubic yard output.

3. Prior to bidding, the plaintiff went to the local office of

the Works Progress Administration in Spokane to inquire concerning the work covered by the invitation to bid, and was directed by that office to the office of L. H. Rubicam, engineer and project supervisor in charge of the work. Plaintiff and Rubicam visited the site of the work and

Primaria and Annicain valled the sife of rote work and primaria and an experimental primary and a primary Rubican advised the plaintiff that the Government would promptly take the crushed rock from the bunders and vernows it to the stock piles, and that there would be no delay caused plaintiff the such removal. Rubican had no authority to enter into a contract for the Government in the contraction of the production of the produc

Plaintiff also inspected the roadbed where the crushed rock was to be used and concluded that it would not be sufficiently completed to receive the rock within the time he expected to crush it. He, therefore, concluded that the use of stock piles would be necessary.

4. On April 9, 1930, plaintiff submitted a bid for the furnishing of a rock-crushing plant of 40 cubic yards' capacity per hour, together with a 3-bin, 100-yard bunker, operator, and all necessary equipment, tools and accessories at 512

\$20.00 per hour. He also submitted a bid for the rental of the crusher on the basis of \$8 cents per cubic yard of crushed atone. Under this bid it was necessary for him to furnish, in addition to the machinery, equipment and personnel listed above, fuel and oil, and a sufficient crew to operate the equipment.

The bid was submitted "in compliance with the above invitation for bids, and subject to all the conditions thereof." It was also submitted on condition that it should be accepted within ten days from the date of the opening of the bids, and that the work was to be done, "unless otherwise specified, within forty-five days after receipt of order."

within forty-live days after receipt of order."

5. Plaintiff's bid was not accepted within the ten days

specified, but was accepted on May 20, 1008, the acceptance form on the invitation for bids having been signed by E. M. Quinn, State Procurement Officer. The bid accepted was the one offering to rent the equipment for a compensation of 38 cents per cubic yard of crushed atons. A complete copy of the contract is attached as actibit 2"A" to plaintiff spection, except that the binals in the bid after the word "within" was not filled in, and the binals after the word "within" was not filled in, and the first blank should be innerted the word become the contract of the word become the contract of the word within the contract; if any, that was entered into between the parties.

6. Plaintiff made no response to this tardy acceptance of his bid, but on June 18, 1936, be began operations, but under this bid, but on June 18, 1936, be began operations, but under the following circumstances: A few days prior to beginning operations the aforesid L I-R Robicam notified plaintiff that he had selected another quarry sits. Plaintiff agreed to do the required work at this site, but with the understanding that the stone should be removed from the bunkers remounts unon beine crushed and dumed in stock biles.

prompty upon being crushed and dumped in stock piles.

A few days later Rabicam orally advised plaintiff that no stock pile sites had been procured and that the crushed rock would be hauled direct from the bunkers to the roadway where it was to be used. The plaintiff orally protested such procedure on the ground that delays would occur, resulting in increased cest to plaintiff, but was orally assured by Robi-

cam that he would recommend that plaintiff be paid the increased cost on account of the change in operations, and plaintiff accordingly moved to the new quarry site, installed a plant of 60 cubic yards' capacity, and arranged with the Government engineer for keeping a record of any delays that would occur because of lack of stack risles.

 On June 21, 1936, the plaintiff confirmed the conversations referred to in the previous finding in a letter to the Works Progress Administration, as follows:

June 21, 1936.

Works Progress Administration.

Realty Building, Spokane, Washington,

Att'n: Mr. Leslie H. Rubicam.

Dark Sur. We present this letter to confirm our conversations advising you that the changes ordered in the operating plans upon which our bid was based will inevitably result in costs considerably in excess of those pertaining to the specifications of our contract, and with no corresponding benefit to us. The abandoment of the stock pile method of rock

storage and the requirement that we store all of our rock production in our bunkers and carry on operations at our plant at all times to accommodate all the operations of hauling, spreading, processing, and rolling rock on the road is a material change and when we are required to sychronize our operations with numerous others over which we have no control the additional cost of this is inevitable and, we believe, understood and admitted.

From your standpoint we appreciate that this change is well mentical as a major saving to the Government and on that ground we do not protect, that we do protect and on that ground we do not protect, the two protects are savings sufficient to cover our increased costs. This amount is impossible to determine at this stage, but provide the savings and the savings of the savings with the savings will be a saving sufficient to cover our control for the savings which we are compelled to stand by and operate our plant without production, and we suggest that you compasse will be an agreement upon which to form a basis for an equitable adjustment.

In the meantime, we are proceeding with the work ordered in accordance with the changes. Yours very truly.

Max J. Kuney, Manager.

8. The invitation for bids specified that the crusher might be rented according to the terms of the invitation for bids after the expiration of the rental period, but not longer than June 20, 1936. On June 20, 1936, only a small portion of the required rock had been crushed, and the defendant decided to further rent the equipment. It, accordingly, presented to the plaintiff a paper denominated "RENEWAL OF CONTRACT NUMBER ER-TPS-93-1430 WITH MAX J. KUNEY COMPANY." This document read as follows:

The undersigned hereby agrees to the renewal of the above contract for a rental period of 3 months from date of expiration on June 30, 1936, at the original rental rate, which is at the rate of fifty-eight (58¢) cents per cubic yard. The estimated number of working (hrs. or days)

required to complete this project is 3 months. The undersigned further agrees that this contract may be cancelled by the Government by five days' written notice. Signed:

Max J. Kuney Company, R. T. McAndrews,

period.

Title: Office Mor. Address: 124 E. Augusta, Spokane, Wash. Renewal of the above contract accepted on July 14, 1936, effective upon expiration of the original rental

> (s) E. M. OIIINN. State Procurement Officer.

It was duly executed by Max J. Kuney Company and was accepted by the Procurement Officer of the Treasury Department on July 14, 1936, effective upon the expiration of the original rental period.

9. The Government issued purchase orders, dated May 26, 1936 and July 25, 1936, for an estimated vardage of 52,939 cubic yards of crushed rock at \$0.58 per cubic yard, and the plaintiff delivered to defendant a total of 53,901 cubic vards of crushed rock, none of which was placed by defendant in stock piles, but all of which was removed by defendant from plaintiff's bunkers to the roadway.

Plaintiff has been paid by defendant at the rate of \$0.58 per cubic yard for the 53,901 cubic yards of crushed rock, the cubic yards and the sums to be paid therefor being certified to by L. H. Rubicam as project superintendent.

10. Defendant's procedure in hauling the crushed stone

from the bunkers of the crushing plant directly to the roadway, instead of piling it in stock piles, caused the rock crusher to shut down 56 times for periods ranging from 15 minutes to 10 hours and 10 minutes. It was shut down 9 times for periods ranging from 30 minutes to 1 hour; 17 times for periods ranging from 1 hour to 2 hours; 16 times for periods ranging from 2 hours to 4 hours; and 7 times for periods ranging from 4 hours to 10 hours and 10 minutes. In addition, there were 7 delays of between 15 minutes and 30 minutes. No record was kept of delays of less than 15 minutes. The total delays of 30 minutes or over aggregated 121.8 hours during the entire period of operation from June 18, 1936 to August 10, 1936. The cause of these shutdowns was that the bunkers were full of crushed stone and no more rock could be fed into them, causing the shutting down of the crusher until the stone was removed. It was necessary, however, to keep the machinery in operation and the crew available pending the arrival of defendant's trucks and the removal of the stone from the bunkers. Upon removal of the stone from the bunkers, crushing operations were immediately resumed, and there was available for defendant's trucks at all times sufficient crushed stone.

11. In June 1937 plaintiff presented a claim to the Treasury Department for payment of increased cost incurred by him due to the delay in the removal of the crushed stone from the hunkers, but this claim was disallowed.

12. A fair and reasonable rental value of plaintiff's equipment for the time it was idle was \$94.00 per hour, and for the total period plaintiff's equipment was idle due to delays of the defendant in removing the stone, 121.8 hours, the fair and reasonable rental value was \$2,923.00.

The court decided that the plaintiff was entitled to recover.

Whitere, Judge, delivered the opinion of the court: The plaintiff claims additional compensation for the time his rock crusher was idle while waiting on the defendant's trucks to remove the stone that had been crushed.

# Opinion of the Court

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On April 3, 1986, the Procurement Division of the Treasury Department advertised for bids for the furnishing of a rock-crushing plant of not less than 40 cubic yards capacity per hour, with 3-bin, 100-yard bunkers. Bids on two bases were required, one on an hourly basis, the other on a cubic-yard basis. Invitation for bids provided, in part.

This bid is solicited in advance of allocated funds. Awards will not be made until funds are available.

The plaintiff put in his bids on both bases on April 9, 1936, and was low on both bases. His bid provided:

In compliance with the above invitation for bids, and subject to all the conditions thereof, the undersigned effers, and agrees, if this bid be accepted within 10 days from the date of the opening, to furnish any or all of the items upon which prices are quoted, \*\* \*.

The bids were opened on April 10, 1936. Plaintiff's bid was not accepted within the ten days specified, but it was accepted on May 96, 1936, 46 days after the bids were opened. After acceptance plaintiff did not communicate with the Procurement Office, but he proceeded to furnish the rock crusher and to crush the rock required. He did this under the following circumstances: Although the contract for the rock crusher was made by the Procurement Division of the Treasury Department, the road work for which the crushed stone was desired was being done under the direction of the Works Progress Administration in the State of Washington near the city of Spokane. Before putting in his bid on April 9, 1936, plaintiff went to the local office of the Works Progress Administration in Spokane to inquire about the work covered by the invitation for bids. He was directed by that office to L. H. Rubicam, who was the Engineer and Project Supervisor in charge of the work. Plaintiff and Rubicam together visited the location of the quarry and the roadway where the crushed rock was to be used. The roadway then had not been sufficiently completed to receive the rock to be crushed, necessitating the use of stock piles, if the crushing was to proceed shortly thereafter, Rubicam also advised plaintiff that the defendant would remove the crushed rock from the bunkers promptly and pile Opinion of the Court
it in stock piles so that there would be no delay to the plaintiff
in the crushing of the rock.

Plaintiff's offer to crush this rock was made on conditions that the bid be accepted within 10 days from the opening of the bids, which was on April 10, 1808. It was not accepted within within that time and, therefore, plaintiff's offer expired, and defondant's later acceptance of it on May 98, 1886 did notant's later acceptance of it on May 98, 1886 did notant of the opening of the major was one of the opening opening of the opening of the opening opening of the opening op

As stated above, plaintiff addressed no communication to the Frocurement Officer. Neither in one way nor another did he tell him whether or not he was villing to go on with the work notwithstanding the tardy acceptance of his offer; but when his offer was accepted he prepared to go aboad with the work and notified the project engineer of his willingness and intention to do so. This gave rise to a contract.

If there can be any doubt that the contract as originally proposed was finally entered into, that doubt is removed by the subsequent dealings between the parties.

The invitation for bids contained a clause giving the deendant the right to extend the restal period for 60-hour periods, but not beyond June 30, 1808. On this date the plaintiff had been working only about two weeks, and the necessary atons had not been crashed, and the defendant displaintiff with a paper 49/ed. "Removal of Contract Monthle ER-TPS-63-1400 with Max J. Kuney Company." This paper read:

The undersigned hereby agrees to the renewal of the above contract for a rental period of 3 months from date of expiration on June 30, 1383, at the original rental rate, which is at the rate of fifty-eight (584) cents per cubic months yard. The estimated number of working (hrs. or days)

required to complete this project is 3 months.

The undersigned further agrees that this contract may be cancelled by the Government by five days' written

notice.

Max J. Kuney Company,
Signed: R. T. McAndrews, Title: Office Mgr.
Address, 124 E. Augusta, Spokane, Wash.

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Renewal of the above contract accepted on July 14, 1936, effective upon expiration of the original rental period.

(s) E. M. Quinn.

This "renewal" was a recognition of the existence of the original contract.

It was a condition of the contract that the defendant would not delay the plantiff in its performance. This necessarily is to be implied, at least. Also, while Robisson did make the planting of the planting of the planting of the contract was to be performed. His representations as to the conditions under which the contract was to be performed. His representations make before planting put in his bid, that stock piles were to be used, confirmed the implied condition of the contract with the contract was the proposed of the planting of the contract with the planting of the planting of the planting of the planting of the lift hid had been accepted and be had agreed to go on with the work, there had been no change in plan so far as be had been advised.

After he had expressed his willingness to go on and was preparing to move his rock crusher to the quarry, the road work had progressed to such a point that the defendant decided not to use stock piles, but to remove the rock to the roadhed direct from the bunkers of the rock crusher, and Rubicam orally advised plaintiff of this change in plan. Plaintiff protested against this change on the ground that delay would occur in taking the rock out of the bunkers, which would necessitate the suspension of operations, and that this would increase his expense. Rubicam, however, assured him that he would recommend payment of the increased cost if there were delays and the cost was increased, and plaintiff proceeded with the work. At this time, however, plaintiff had already accepted the contract and this notification by Rubicam of a change in plan did not change the conditions thereof. In the first place, Rubicam had no right to change the terms of the contract, and, in the second place, he did not propose to do so, because he said that if there were delays he would recommend that plaintiff be compensated therefor. He certainly did not mean to impose a new condition, that plaintiff should not be compensated if delays Opinion of the Court
ensued. Plaintiff entered upon the performance of the
contract on the original condition that he would not be
delayed in its performance.

There was nothing therein contained about stock piles; the contract did not specify that defendant would remove the rock from the bunkers as soon as crushed, but it is to be implied, as we have stated, that it would not delay the plaintiff in the performance of his contract. Failure to remove the rock when the bunkers were full necessarily stopped the work. The proof shows that 7 times the defendant delayed plaintiff from 4 hours to 10 hours and 10 minutes, 16 times from 2 hours to 4 hours, and 17 times from 1 to 2 hours, 9 times from one-half hour to an hour, and 7 times from 15 minutes to 30 minutes, a total of 121.8 hours. By proper management defendant could have prevented the bunkers from filling up. If this could not have been done otherwise. it could have been done by placing in stock piles the rock they were not ready to place on the road at the time. It was its duty to do this. It did not do so in order to save itself expense.1 but this put plaintiff to extra and unnecessary expense. For this defendant is liable.

per hour, but he now claims \$84.00 an hour as the reasonable rental value. He explains this discrepancy by stating that his \$80.00 an hour bid did not include fuel and oil, and included but one man to operate the machini, whereas, under his bid that was accepted he was required to furnish free, oil, and a complete of the second of the second of the second of the complete of the second of the second of the second of the the machine was file. Robbicam himself says this was fair. We are of opinion he is suitful to recover at this rate.

Plaintiff originally offered to rent his crusher for \$20.00

That rental value of the equipment is the proper measure of damages in a case such as this one is not open to dispute. See Steel Products Eng. Co. v. United States, 71 C. Cls. 437, 141, M. Cain Go, Jea., v. United States, 76 C. Cls. 260; Schuler & McDonald, Inc., v. United States, 85 C. Cls. 631; But Engineering Co. v. United States, 85 C. Cls. 461; Samuel Plato v. United States, 85 C. Cls. 461; Samuel Plato v. United States, 85 C. Cls. 461;

<sup>&</sup>lt;sup>1</sup>The proof shows the defendant saved \$20,000 by not using stock piles.

Opinion of the Court

It results that the plaintiff is entitled to recover from the
defendant the sum of \$2,923.20, for which amount judgment
will be rendered. It is so ordered.

Jones, Judge; Littleton, Judge; and Whaley, Chief Justice, concur.

# MADDEN, Judge, dissenting:

I do not agree with the foregoing decision and opinion. At the time plaintiff made his contract, by his acceptance of the defendant's counter offer, he had been specifically advised that the crushed rock would be taken directly to the road from the crusher. He knew, and said, that that would entail delays which would increase his expense. He nevertheless moved his equipment to the quarry and began the work. The contract thus made, and later expressly renewed after performance in just this manner had been going on for a period, was a contract to furnish crushed rock to be hauled from the crusher and placed directly on the road. If it were material to the issues, it might be said that there would be implied in the contract an agreement by the defendant that it would use due diligence to remove the stone from the crusher as rapidly as good road-building practice would permit, so as not to put plaintiff to unnecessary delay and loss. But such an implied agreement is not involved here, because there is no finding, and no evidence, or assertion, that the defendant did not use such diligence.

or assection, that the detendant due do use such citigates. We have then a situation where both plaintiff and the defendant did caucity what they agreed to do, yet plaintiff recovers from the defendant and salditional amount for breach of contract. And so the admittedly manuforied and another than the saldition of the contract for the government, that plaintiff be paid more than the contract for the government, that plaintiff be paid more than the contract provided, is translated into a judemnet.

i judgment. I would dismiss plaintiff's petition.

Reporter's Statement of the Case

95 C. Cls

## JOHN LOMAX v. THE UNITED STATES

INo. 44353. Decided February 2, 19421

On the Proofs

Pay and allowances: retirement of enlisted man after 30 years' seru-

ice; demotion after retirement application.-Decided upon the authority of Blackett v. United States, 81 C. Cls. 894: Standerson v. United States, 83 C. Cls. 633; Dene v. United States, 89 C. Cls. 502; Hornblass v. United States, 93 C. Cls. 148. LaForce v. United States, 77 C. Cls. 179, distinguished.

The Reporter's statement of the case:

King & King for the plaintiff. Mr. Fred W. Shields was on the brief.

Mr. Rawlings Ragland, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant.

The court made special findings of fact as follows:

1. February 25, 1891, the plaintiff enlisted in the United States Army. May 29, 1914, after various reenlistments. plaintiff had credit of more than 30 years of service in the Army, counting foreign service as double time,

2. May 29, 1914, plaintiff held the grade of first sergeant, and on that date made application through his Commanding Officer to the War Department for retirement in the grade of first sergeant. June 8, 1914, after his application for retirement had been forwarded to the War Department. plaintiff was reduced to the grade of sergeant by his Commanding Officer. No cause is shown for this demotion.

3. June 12, 1914, plaintiff's Commanding Officer, by letter, notified the Adjutant General of the United States Army of plaintiff's reduction from the grade of first sergeant to the grade of sergeant and requested that the necessary change in grade be made on plaintiff's application for retirement. This letter was forwarded by the Adjutant General to the Judge Advocate General of the United States Army. who held that if plaintiff was then retired he would have to be retired as a sergeant. August 6, 1914, plaintiff was by order of the Secretary of War placed upon the retired list Opinion of the Court

in the grade of sergeant, since which time he has received the pay and allowances of a retired sergeant.

4. If it is held that plaintiff is entitled to the retired pay of first sergeant from December 12, 1932 (the petition in this case was filed December 12, 1938), to December 27, 1938, the date on which the motion for call on the General Accounting Office was allowed by this court, the amount due him would be \$4.971.43. The claim is a continuing one.

The court decided that the plaintiff was entitled to recover.

GREEN, Judge, delivered the opinion of the court:

The controversy in this case is whether an enlisted man in the United States Army, who has served thirty years, reached the grade of first sergeant and made application for retirement, can be demoted without cause and retired in the grade of sergeant.

This court has four times held that under the Act of 1907 (in force at the time) this cannot be done, as he had acquired under the statute a vested right of retirement of the grade he had reached when he made his application. See Blockett v. United States, 81 C. Clis. 894; Standerson v. United States, 80 C. Clis. 635; Clis. 635; Occ. 1904; States, 80 C. Clis. 635; Occ. 1904; States, 80 C. Clis. 635; Standerson v. Third States, 80 C. Clis. 636; Hornblan v. United States, 80 C. Clis. 635; Occ. 636; Hornblan v. United States, 80 C. Clis. 635; States of the Control of the C

So far as the question of repeal is concerned, the amended statute upon which the plaintiff relies (34 Stat. 1217, c. 2515) reads:

\* \* That when an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventyfive per centum of the pay and allowances he may then be in receipt of, \* \* \*

Section 2 of the same Act provides:

Sec. 2. That all Acts and parts of Acts, so far as they conflict with the provisions of this Act, are hereby repealed.

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The construction we have given to the statute follows its literal language and if it can be said to operate as a repeal in any respect of the law as it theretofore stood, Section 2 provides for it.

Defendant cites the case of LaForge v. United States, 77 C. Cls. 179. The only question raised and decided in this case was altogether different from the one we have before us. It was contended in that case that the Captain who promoted the plaintiff to first sergeant did not follow a circular of instructions which he had received; and because he had not done so, the power exercised by him in appointing the plaintiff as first sergeant had no validity. In effect, it was contended that the plaintiff was not in fact a first sergeant at the time he was retired, and consequently could not be retired in that grade; but the court held that the Captain under Army regulations had the power to appoint him first sergeant, and that while the disobedience of a circular of administrative routine might bring upon the Captain a discipline of the service it did not invalidate the appointment. The court quoted the certificate of the Secretary of War which showed that the plaintiff was retired as a first sergeant and upon this fact it based its judgment. We think the decision has no application to the case now under consideration.

The argument of defendant seeks to inject an ambiguity by reference to the former statute but as said in the opinion in the Homblass case, supra, "a supposed ambiguity may not be injected into such an act by reference to some different language in a prior statute". The whole subject is also controlly discussed in the Homblass case, supra, and strong reasons are stated for the construction then given which we now follow

To the reasons given in the Horablass case, we might add that the construction sought by defendant would in many cases make the grade of retirement depend entirely upon the whim of the soldier's or salier's superior offere, who could by demoting him without cause or reason lessen the amount of his retirement pay. This would be very unjust to the enlisted man who had faithfully served the time required by Congress and earned by superior service his invo-

Dissenting Opinion by Judge Madden

motion to the grade in which he was retired. We do not think it reasonable to hold that Congress so intended. In the instant case, no cause is shown for the demotion of the plaintiff and no question arises with reference to the time when he was promoted. He was a first sergeant when retired and presumably in receipt of the pay of that grade.

The claim is a continuing one. The plaintiff is entitled to recover but his petition was not filed until December 12, 1938, which fixes the date from which his recovery will begin at December 12, 1932. Judgment in his favor will be entered upon filing a report from the General Accounting Office showing the amount due the plaintiff from December 12, 1932, to the date of judgment.

LITTLETON, Judge: and WHALKY, Chief Justice, concur. Jones, Judge, concurs in the result.

Manden, Judge, dissenting: I do not agree with the decision of the Court. I think that the court should return to the interpretation of the applicable statutes which was made in the case of La Force v. United States, 77 C. Cls. 179. In that case, the plaintiff was a sergeant at the time he applied for retirement. Before his application was approved, he had been made a first sergeant, which he was when he was actually retired. The court held that his rank at the date of retirement, rather than his rank at the date of application for retirement, determined his pay and allowances after retirement, He was, accordingly, given a judgment for the difference between the retired pay and allowances of a sergeant, which he had been receiving, and those of a first sergeant.

The language of the applicable statutes and their legislative history seem to me to justify that interpretation, I therefore disagree with the conclusions reached in the later cases which seem to have, sub silentio, overruled the La Force case. Those later cases are Blackett v. United. States, 81 C. Cls, 884: Standerson, v. United States, 83 C. Cls. 633; Dene v. United States, 89 C. Cls. 502; Hornblass v. United States, 98 C. Cls. 148; and the instant case. In

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all of them the plaintiff, instead of having been promoted between the date of application for retirement and that of actual retirement, had been demoted, but that is surely a circumstance immaterial to the question of statutory

construction.

The Act of February 14, 1885 (23 Stat. 305), as amended by the Act of September 30, 1890 (26 Stat. 504, U. S. Code Tit. 10, sec. 947a), provides in part as follows:

That when an enlisted man has served as such thirty years in the United States Army or Marine Corps, either as private or non-commissioned officer, or both, he shall by application to the President be placed on the retired list hereby created, with the rank held by him at the date of retirement, and he shall have the such that the state of retirement, and he shall and allowances of the rank upon which he was retired, \* \* \* \*

The Act of March 2, 1907 (34 Stat. 1217, U. S. Code Tit. 10, sec. 980), provides as follows:

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That when an emitted man shall have served thirty to be a subject of the state of the

SEC. 2. That all Acts and parts of Acts, so far as they conflict with the provisions of this Act, are hereby repealed.

Both acts were quoted in the La Forge case, and then the Act of 1890 was particularly applied to a soldier who applied for retirement in November 1914, and was retired in December of that year, having been promoted in the meantime.

The Act of 1907 does not expressly repeal the Act of 1890. It contains only a clause of general repeal of all acts or parts of acts inconsistent with the later legislation. meaning in this regard.

By its quotation and application of the 1890 Act in the La Forge case, the court apparently concluded that that Act was not inconsistent with the 1907 Act on the point at issue, and that either the 1907 Act had the same meaning as the 1890 Act with regard to the date as of which retirement pay and allowances would be computed, or that the 1890 Act was still in effect and applicable. I think the former view is probably correct and that the 1890 Act was pro tanto superseded by the 1907 Act. But the point is an immaterial one if the two Acts have the same

It is true that the language of the 1907 Act is less clear as to the date as of which the retirement allowance is to he fixed than that of the 1890 Act. Nevertheless, I think that Congress intended the same date in both acts. My reasons for thinking so are as follows.

(1) This is the more natural meaning of the language. The 1907 Act says "\* \* when an enlisted man shall have served thirty years, \* \* \*, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of. . . ". The reference of the word "then" to the event which immediately precedes it in the sentence, viz, his being placed upon the retired list, would be in keeping with the ordinary use of our language. If the reference is not made to the immediately preceding event, the date of retirement, a further ambiguity is introduced because there are two other events mentioned earlier in the sentence, viz. the soldier's having completed thirty years' service and his making application for retirement, either of which could, with some logic, be selected as the event referred to.

(2) I think it is attributing an unnatural intention to Concress to suppose that it intends that one who is in fact. at the date of his retirement, a first sergeant by reason of an intervening promotion, or a private by reason of an intervening demotion, should have the rank and allowances of something he is not, viz. a sergeant. The department which is responsible for evaluating his services has given him a certain rank in the army, and it is hard to imagine

Dissenting Opinion by Judge Madden a reason why Congress should wish to place him in a higher or lower rank, as a retired soldier. I think such an intention on the part of Congress would be so unusual that we might expect the statutory language to express it with clarity.

(3) We know, to a practical certainty, what Congress meant by the 1907 Act. Senate Bill 3638 became, without amendment, the Act of March 2, 1907. The report of the Committee on Military Affairs to the Senate 1 merely recommended that the bill pass, and invited attention to a memorandum, quoted verbatim in the report, from the Chief of Staff of the Army to the Secretary of War, transmitted by the Secretary with his approval to the Senate. The memorandum contains the following language:

So far as the Army is concerned, the bill makes the following changes in existing laws:

1. It allows enlisted men to count service in the Navy in time of peace for purposes of retirement. 2. It authorizes an allowance of \$6.25 per month in

lieu of quarters, fuel, and light furnished men on the active list.

In the House of Representatives, Congressman Hull reported S. 3638 and asked unanimous consent for its consideration. The following discussion is all that is pertinent 2

Mr. Whelams, Mr. Speaker, I would like to ask the gentleman in charge of the bill to whom the bill applies-to what rank?

Mr. Hull. It applies to none above the rank of en-

listed men of the Army, Navy, and Marine Corps. It changes the law by allowing those who have served thirty years in the Army, Navy, or Marine Corps and who are on the retired list \$6.25 a month additional pay. That is all there is in the bill. Mr. MANN. That is the only change?

Mr. HULL. There is no other change in the law. It

simply gives the man who serves his country thirty vears in the enlisted forces of the Army, Navy, or Marine Corps \$6,25 a month.

<sup>\*</sup> Senate Report No. 1791, 59th Cong., 1st Seas. \* Cang. Record, Vol. 41, Part 4, p. 3943.

#### Syllabus

This evidence of Congressional intent seems to me to show beyond question that the proponents of this legislation had no doubt that the Act of 1007 meant, in regard to the point in question, just what the Act of 1800 had mean. Whether it repealed the Act of 1800 by changes in the two particulars intended, or merely duplicated parts of it which were not inconsistent, leaving both acts in effect, is so I have said, nor material here.

With this evidence of what those who framed the statule scatully meant, a court having the responsibility of constraing the statute would be justified in stretching the lanquage actually used to considerable length to give it that meaning and thus carry out the intent of Congress. Here no stretching in recessary. The normal meaning of the no stretching in recessary. The normal meaning of the order of the stretching of the stretching of the control of the stretching of the stretching of the control of the stretching of the order of the stretching of the str

I think, therefore, that plaintiff, being a sergeant when he was retired, and having received the retired pay of a sergeant, is not entitled to more.

# JOHN D. FICKLEN v. THE UNITED STATES

# [No. 44381. Decided February 2 ,1942] On the Proofs

Pop and allocences; officer in six Corps Reserve, U. R. A., soith dependent modeler—Where It is alrown by the evidence that pisinist, an officer in the Air Corps Reserve, United States Army, on active duty as Capitain, decaded to day with the Civilian Conservation Corps, was not furnished quarters after the conservation Corps, was not furnished quarters and control of the control of the Civilian Conservation Corps, was not furnished quarters and control of the control of the Civilian Conservation Corps, was not furnished quarters and collect of the rank without a deposition, and that plants of the certain control of the Civilian Control of the Ci

Same.—The evidence adduced establishes that plaintiff's mother was in fact dependent upon him for her chief support within the meaning of the applicable statutes. The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. Messrs. King & King were on the brief.

Miss Stella Akin, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant. Mr. Elihu Schott was on the brief.

Plaintiff, a bachelor officer of the Air Corps Reserve, U. S. Army, uses to recover rental and subsistence allownoses sutherized by law for an officer of his rank having a dependent mother for the periods from October, 8, 1933, to October 7, 1964, and from December 4, 1984, to March 29, 1938, during which periods he was on active duty with the U. S. Army under assignment to the Civilian Conservation Corp\* activities.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

 Plaintiff is an officer in the Air Corps Reserve, United States Army, and has served on active duty, as a captain, detailed to duty with the Civilian Conservation Corps from October 8, 1933, to October 7, 1934, and from December 14, 1384, to June 14, 1938.

The plaintiff was a bachelor officer until March 25, 1938, on which date this claim terminates.

2. Plaintiff's mother, Mrs. Mary Lyon Ficklen, was born in 1867. Her husband, plaintiff's father, died in 1894, leaving her 189 acres of land located near Pueblo, Colorado, and \$4,000 in insurance. Out of the insurance she paid the funeral expenses and other obligations amounting to \$1,000, leaving her a balance of \$3,000. The plaintiff is the only child

3. Plaintiff's mother was not gainfully employed during the periods covered by this claim, and on account of her advanced age did not have employment of any kind. Plaintiff's mother during the periods of this claim did not own any income-producing personal property, but she did own the following real property:

\$2,000,00

600,00

900,00

980 00

750 99

	Reporter's Statement of the Case
	A ½ interest in 12 houses located at Fulton and Glen- wood Streets, Atlanta, Georgia. These houses were resided to Negro tenants. Her interest in this prop- erty was subject to a mortgage of \$2,000, bearing interest at 6 percent per annum. The value of her interest in this property was
(2)	An entire interest in a house located at 03 Hilliard

race, Atlanta, teorgan, which was rented to Negretennous. Her interest in this property, together with the property described in the preceding paragraph (2), was subject to a mortage of \$3,150, bearing interest at 8 percent per annum. Her interest in this property was relund.

property was valued at.

(4) A. 5 interest in a cottage located on Willow Street,
Atlanta, Georgia, which she jointly owned with a
sister. Her interest in this property was subject to
a mortgage of \$750, bearing 6 percent interest per

annum. Her interest in this property was valued at.

(5) An entire interest in a vacant of located on Howell Mill Road, Atlanta, Georgia, valued at.

(6) A ¼ interest in a vacant lot located at 90 Enst Cain Street, Atlanta, Georgia, her interest valued at. (7) A ¼ interest in a vacant lot located at Hormsday and Jefferson Streets, Atlanta, Georgia, her interest

(8) A ½ interest in a house located at 2114 Howeli Mill Road, Atlanta, Georgia. The house was occupied as

going parcels of land amounted to \$3,900.

The mother also owned an entire interest in a vacant lot on Wesley Avenue, near Atlants, which was sold about the

time of the termination of the second period for \$4,000. After payment of the mortgage of \$2,000 and accrued interest, and costs of sale, the balance of \$600 was used to defray medical and hospital expenses due to a severe injury suffered by the mother.

The mother had to borrow money from the banks from time to time, on her personal notes endorsed by plaintiff, to pay pressing obligations, such as taxes, etc. These loans were in amounts from \$250 to \$750.

The interests in the properties owned by plaintiff's mother, aside from the 160 acres in Colorado, were acquired by her years before the period in controversy, through inheritance from her mother and a brother, and by purchases with insurance money she received at the time of the death of plain-

tiff's father.

During the periods in controversy none of the real property
described in the preceding finding could have been sold
advantageously and without incurring unnecessary financial
sacrifices.

5. The real property owned by the mother formerly yielded a unifactory income. Since the beginning of the depression great difficulty has been experienced both in reatting the property and in collecting the rests. The mother's real property of the rest of

6. During the periods covered by this claim plaintiff's mother lived with two of her sisters in a house at 2114 Howell Mill Road, Atlanta, Georgia. She paid about one-third of the general household expenses. The mother lived economically and her total average monthly living expenses were shout 500 or 500 month.

7. The plaintiff made regular contributions to the support of his mother prior to 1933, and since October 8, 1933, has contributed at least \$100 a month to her, which contributions were her sole source of income except for the small income hea at times received from her property, as heretofore stated. Reporter's Statement of the Case

8. During the periods from October 8, 1933, to October 7, 1934, and from December 14, 1934, to March 25, 1938, the plaintiff while assigned to and performing active duty was not paid the rental and subsistence allowances of an officer with dependents.

In the Comptroller General's reply, which is plaintiff's Exhibit No. 2 and made a part hereof by reference, he states:

In reply to plaintiff's request in the above entitled cause as allowed by the court December 28, 1938, you are informed that if the court should hold that plaintiff's mother was dependent upon him for her chief support during the periods of plaintiff's active duty in the years from 1933 to 1938, inclusive, there will be due him \$8,965.34, computed as follows: \* \* \*

In the Comptroller's reply it appears that the computation was made on the basis that the plaintiff received no rental and subsistence allowances and that he occupied no officers' quarters during the time in controversy. How the plaintiff was quartered during the periods of this claim is set out in the next finding.

 During the periods from October 8, 1933, to October 7, 1934, and from December 14, 1934, to March 25, 1938, the plaintiff, while assigned to and serving on active duty with the Civilian Conservation Corps, occupied the following kinds

the Civilian Conservation Corps, occupied the following kinds or types of quarters: (1) During the period from October 8, 1983, to October 7,

1954, he during the first two months of the periol, occupied quarters consisting of carwas shalter farmished by the featurat; thereafter he and other officers stational at the recommendation of the control of the control of the two rooms would not likely one of which was thereafter exceptle by plaintiff and another officer. The construction of the two rooms involved a cost of approximately 855, the balance lwing conrooms involved as cost of approximately 855, the balance lwing conroom involved as cost of approximately and the control of the for the baster, amounting to approximately 87 a month for for the baster, amounting to approximately 87 a month for the control of the control o Some time after the construction of the two buildings referred to above such improvements as new roofing, the cutting of additional doors and windows, and the addition of a toilet and bath for general use were made in the buildings, the cost of which was paid by the defendant.

(2) During the period from December 14, 1934, to March 5, 1938, plaintif was furnished by defendant, and occupied as quarters in the various camps at which he was stationed, a single room about ten by twelve feet in size. He occupied the room alone, but the toilet and bathing facilities for general use were shared with other officer personnel (usually three officers and an educational advisor) stationed at the camp.

(3) At no time during the period of the claim were adequate quarters as provided by law furnished for plaintiff and his dependent, and such adequate government quarters were not available. The shelter and room compiled by law for an officer of his rank with or without a dependent. There was no determination by competent apperior authority of the service concerned that a lessen number of room than the number of room provided by the would be adequate the number of room provided by the would be adequate.

10. During the period of the claim involved, plaintiff's mother was in fact dependent upon him for her chief support,

The court decided that the plaintiff was entitled to recover.

Letteron, Judge, delivered the opinion of the court:

The first question in this case is whether plaintiff mother was in fact dependent upon him for her chief support within the meaning of section 4 of the Act of June 10, 1922, 42 Stat. This issue arise by reason of renewal by connect for defendant of the contention made and overruled in prior cases that if defendant's mother had pursued a different business policy that the content of the content

#### Opinion of the Court

che only had an undivided interest she might have been able to derive a monthly income which, if she had been able to collect, would have been sufficient to take care of most, if not all, of her reasonable and necessary living expenses. The proporties which plaintiff's mother owned, or in which she had an interest, and the value thereof are described and set forth in findings 3 to, inclusive.

The proof shows that prior to the depression and the economical conditions existing thereafter, insofar as they affected property of the type described, the properties yielded an income which was sufficient for the support of plaintiff's mother, but that in recent years and during the periods of the claim here involved great difficulty was experienced both in renting the property and in collecting rents. The proof further shows that none of the real property in which plaintiff's mother had an interest could have been sold advantageously without incurring financial sacrifices. Moreover, plaintiff's mother only owned an undivided interest in most of the real property; and the defendant's contention. in connection with which it introduced some testimony that if plaintiff's mother or the plaintiff, who looked after the interests of his mother, had pursued a different business policy in selling some of the properties and in remodeling, repairing, and improving the others, such policy would have produced the asserted theoretical results, does not carry much force.

much force the down and there is no contention that the Librative in which plaintiffs models had as interest were deliberately handled by the mother, or by plaintiff as her representative, in each away as to show her dependency upon plaintiff for her chief support. They did the best they could with the properties as they were handled and nasaged, the highest degree of skill in handling or administering her property interests, and the court will not inquies into the matter. Nor will the court, in determining the fact as to whether, during the period for the property interest, and the court will, ask to decide on this fact upon what come real-estate dealer might think be could have done with the property as a whole in the way of increas-

Opinion of the Court ing the income therefrom by decreasing the property and investing the proceeds in improvement of the balance. This would be only conjectural and no comparable instance where such a policy was successfully carried out is proven. Tomlinson v. United States, 66 C. Cls. 697: Bradley v. United States. 74 C. Cls. 521; Freeland v. United States, 74 C. Cls. 471, 476, 477: Undearaff v. United States, 75 C. Cls. 508, 532,

The proof shows that during the years 1933 to 1935, inclusive, the total income received from the property interests of plaintiff's mother was from \$100 to \$150 a year less than the amounts expended and necessary to be expended thereon for unkeen renairs, taxes, and interest, and that during the years 1936 to 1938, inclusive, the net income received by plaintiff's mother from her interests in the properties was \$50 or less a vear.

Prior to 1933 plaintiff made regular contributions to his mother which constituted her chief support and since Octoher 8, 1933, the beginning of the periods involved in this suit, plaintiff has regularly contributed at least \$100 a month to his mother for her support, which contributions were her sole source of income, except for the small income she at times received during the years 1936, 1937, and 1938 from her property interests as above stated. It is clear from the facts and circumstances described by the record that she was in fact dependent upon plaintiff for her chief support within the meaning of the applicable statutes.

The next question is whether plaintiff is entitled to recover the full statutory allowance authorized by law for an officer of his rank in lieu of government quarters adequate for himself and his dependent mother. No adequate government quarters for himself and his mother were furnished or were evailable. But defendant contends that since the plaintiff while assigned to active duty with the Civilian Conservation Corns occupied quarters of the sort described in finding 9 there should for that reason be deducted from the fixed statutory allowance in lieu of quarters for an officer of plaintiff's rank with a dependent the amount of \$981.93 less \$85 expended by plaintiff in connection with the shelter occupied by him as set forth in finding 9 (1) and judgment entered in his favor for only \$3,029.41 if it is found that his mother was deduction.

Syllabus dependent upon him for her chief support during the periods involved.

The record shows that plaintiff was not furnished quarters adequate for himself and his dependent mother, or adequate quarters for an officer of his rank without a dependent, and that the total of the statutory allowances in lieu of such quarters during the periods of the claim is \$1,592.3.4. (See finding 9.) We are of opinion that plaintiff is therefore critical to recover this amount in full without any

Judgment will therefore be entered in favor of plaintiff for \$3,926.34. It is so ordered.

Madden, Judge; Jones, Judge; and Whitaker, Judge, concur.

WHALKY, Chief Justice, concurring:

I concer in the result reached by the majority opinion. The findings show that a to nitude outring the period involved did the plaintiff receive from the Government facilities that could be called quaters in any proper sums, even for himself and the country of the country of

### JOSEPHINE V. HALL v. THE UNITED STATES

[No. 44924. Decided February 2, 1942] \*

# On the Proofs

James 182; depreciation; amortization; recompened.—Where under the will of decodent, the treates of the estate, of which plainiff was a beneficary, and which consisted of leuesholds and other property, distributed to the beneficiaries, including plaintiff, the net income without deduction for depreciation, obselection, or amortization; and where in 2002 the trustees, in accordance with a treat provision conferring such discretion, and said leagesholds and distributed to the the beneficiaries.

<sup>\*</sup> Certiorari denied April 6, 1942.

the entire seeks through middle through the content and the content and the content and through middle through the content of the content and the content and

Some—It is held that plaintiff is not entitled, under the common law doctrine of recoupment, to recoup alleged overgazonest of income taxes for the years prior to 1926, during which depreciation was not allowed, against income taxes for the years 1925. The content of the prior to 1926, the prior to 1926 was considered in fixing the basis of for the years prior to 1920 was considered in fixing the basis of the prior to 1920 was 1920 to 1920. The prior to 1920 was prior to 1920 was 1920 to 19

Some—Where plaintiff did not at may time the a claim for refund of alleged overgarment of taxes for the years prior to 1009, and where plaintiff under the attactes had the privilege of filing such claim and in case of rejection to file timely suit therefor; and where if plaintiff had the right to an allowance for depreciation in said parts much right could have been established; it is brief that under sections 506 and 500 of the or the country of the country of the country of the country of reconcept 500 plaintiff is not centricle to recover by way of reconcept.

Some.—If the right to a refund could not have been established under the statutes in effect prior to 1029, plaintiff cannot properly claim recomponent inter. Some.—Limitation statutes are enacted for the benefit of the taxpayer ag well as the Government.

The Reporter's statement of the case:

Mr. Robert Ash for the plaintiff. Messrs. Mitchell & Van Winkle were on the briefs.

Mr. John A. Rees, with whom was Mr. Assistant Attorney General Samuel O. Clark, Jr., for the defendant. Messrs. Robert N. Anderson and Fred K. Dyar were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a citizen of the United States and a resident of New York City.

2. Thomas R. A. Hall, a resident of New York City, delicated February 10, 1910. He was survived by his widow and three children, William W. Hall, Lillian Ellal Abbett, and Josephine V. Hall, plantiff herein. His last will and testament dated October 29, 1909, was duly admitted to practace by the Surropate of New York County and letters testamentary thereunder issued to William W. Hall, his exception. The contract of the William H. Hall, William W. Hall, and Charles E. Hall continued as sole surviving executors and trustees.

By the seventh paragraph of his will, the testator gave his entire residuary estate in trust to his executors in the following language:

In special trust and confidence, however, that they will take possession, manage and control the same, and invest and reinvest the same from time to time as they may deem best for the interest of said estate, and that they will hold and manage the same, and pay over the net income, as often as may be convenient, to the beneficiaries as follows: In case my wife survives me they shall hold one-third of said estate for the benefit of my said wife for and during her natural life; and they shall hold and manage the remaining two-thirds of my estate or, in case my wife shall not survive me, then the whole of said estate, in trust for the benefit of my three children, William W. Hall, Lillian Hall Abbett and Josephine V. Hall, in equal shares and proportions for and during their respective lives, and that in case my wife survives me, then after her death, they hold the one-third in which she is interested for life, for the benefit of my said three children in equal parts or shares. These provisions are subject to the right on the part of my executors to advance any part or parts of the principal sum to any of the beneficiaries whenever and as often as they deem proper to do so, and I give them full power and discretion to make such advances to the several beneficiaries out of the principal of the shares set apart for their benefit as hereinbefore pro-

The trustees under the will of Thomas R. A. Hall, deceased, were the owners on March I, 1913, of two leaseholds known as No. 634 and No. 636 Fifth Avenue, New York City. The terms of both leases expired May 1, 1938. The testator's widow died prior to 1932. Before her death the trustees distributed one-third of the net income (without destination for depreciation, choolescence, or amortization) to the widow and two-thirds to the three children. After the death of the widow the annual an income (without After the children, and the children, and the children, and the children, all of whom were adults.

3. The two leasheds mentioned in the preceding finding, together with carrian other property, constituted all the corpus of the residuary trust created by the will of Thomas R. A Hall. The trustees under that will were the owners of those leashedds on March 1,1918, and until June 8, 1939, when (having first secured the consent of the three beneficiaries, William W. Hall, Italian Hall Abbett, and Josephun V. Hall, Lallian Hall Abbett, and Josephun V. Hall, the plantial flereis) by executed a contract of also thereof to the trustees of Columbia University for the sum of \$10,077500 layable in equal monthly install. Details are precided of airly-nine mentils ending April 16, 1988. The apried to disably-nine mentils ending April 16, 1988. The greated monthly payments were not executed by area lion.

Thereafter on June 17, 1932, the trustees executed a written declaration reading in part as follows:

NOW, THEREFORE, pursuant to the power and discretion vested in said executors, as aforesaid, one-third of the net sums to be received for the saile of said leases and leaseholds is hereby set apart for each of the three said beneficiaries, and the payment of such one-third direct to each of said beneficiaries is hereby authorized to be made.

This declaration was executed by the trustees pursuant to power and suthority vested in them by the will of Thomas R. A. Hall as interpreted by the Surregates Court of the Appellate Division and had become final, rendered in two separates proceedings brought to secure a decree requiring the trustees to withhold a pertion of the net income from the country of the c

Repetier's Statement of the Case
trust, refused to require or permit the setting up of a fund
out of income for amortization or depreciation and decreed
that the whole of the net income must be distributed. It
also held that the trustees had the power, within their discretion, to pay out all or any portion of the principal of

the trust fund at any time they saw fit.

In October 1935, pursant to subhority and with the express approval of the Surrogates Court, the trustees terminely the subhority and the surrogates court, the trustees terminelating understructed income, to the life tenants and beneficiaries, William W. Hall, Lillian Hall Abbett, and beneficiaries, William W. Hall, Lillian Hall Abbett, and beneficiaries, which is the subhority of the three beneficiaries executed a receipt which, in concerning, result in parts is follows:

NOW, THEREFORE, I. JOSEPHINE V. HALL, the undersigned, one of the three residuary legatese of the said estate, do hereby acknowledge receipt from the said Trustees of the following cash and securities in full settlement of my distributive share of said estate:

A one-third interest in a contract dated June 8, 1982, between surviving Trustees and the Trustees and University under which contract there remains to be paid \$735,90.08 in monthly installments com-

mencing with October 1938 \*\*

4. Prior to the enactment of Section 23 (k) of the Revenue Act of 1998, the Commissioner of Internal Revenue did not allow the beneficiaries (including plantiff) to delauct from income received any allowance for exhaustion, wara tear, boolescence, amortization, or depreciation, nor did he allow the trustees any like deduction because they had not executly withheld any income and had not set up any

reserve.

5. In computing taxable profit upon the sale of the lease-holds referred to in finding 3, the Commissioner reduced the basis for computing gain or loss by depreciation on the buildings and amortization of the leases from March 1, 1913, to the date of sale and valued the future installment

payments at \$682,350.00 instead of face value. The March 1, 1913, value of the buildings and leaseholds as used by the Commissioner, the depreciation and smortization computed thereon, and the residual value found by him for the purpose of determining the gain realized on the sale were as follows:

	March 1, 1913, value	Dependation	Residual value
Building at 634 Fifth Avenue Building at 636 Fifth Avenue Lesse.	\$151, 331.00 \$43,000.00 621,794.00	1 \$58, 756, 88 1 239, 955, 90 1 235, 423, 92	\$92,564.12 322,135.00 96,370.08
	1, 116, 125.00	595, 055. 80	821,069.20

<sup>1</sup> This depreciation was calculated at the rate of 2% for the period March 1, 2013, to the date of 300.

1 This figure represents americation over the same period.

6. On the basis of the computation referred to in the pre-

ceding finding, the Commissioner computed capital gain to plaintiff for the years 1999, 1983, 1984, and 1985 in the respective amounts of \$18,700.97, \$73,948.20, \$2,200.33, and \$5,220.00, and sa result of that computation the Commissioner determined additional taxes against plaintiff which were timely sessessed by the Commissioner and paid by plaintiff as follows:

Year	Tex	Interest	Date assessed	Date paid	Total
1892 1693 1994 1695	\$1, 539. 70 8, 490. 30 57, 72 800. 54 10, 858. 25	\$278. 49 1, 572. 30 10. 88 302. 53 2, 064. 30	June 11, 1937 June 11, 1937 May 6, 1938 May 6, 1938	June 30, 1937 June 30, 1937 May 30, 1938 May 30, 1938	\$1, 618, 19 10, 022, 63 68, 60 903, 37 13, 922, 88

7. On July 24, 1937, plaintiff filed formal claims for rend for 1029 and 1038 in the respective amounts of \$1,508.70 and \$5,603.00 and on March 2, 1939, plaintiff filed similar of \$8.772 and \$8,903.60 and on March 2, 1939, plaintiff filed similar the property of \$8.772 and \$8,903.60 and 1030 and depreciation of \$8.772 and \$8.903.60 and 1030 and depreciation deduction for all years prior to 1029, also was entitled to recompanie for 1952, 1953, 1954, and 1955 under the authorization and amountaints for years prior to 1929 had been claims and amountaints for years prior to 1929 had been.

used to reduce the basis in computing 1932, 1933, 1934, and

1935 gain although no deductions therefor had been allowed in computing income for years prior to 1929.

8. Plaintiff filed individual Federal income tax returns for the calendar years 1919 to 1928, inclusive, reporting taxable income and taxes due as hereinafter set forth. The taxes so reported were based in part upon income which included income received from the estate of Thomas R. A. Hall as follows:

1919			
1920	15, 908. 59	1925	22, 500, 00
1921	20, 603, 02	1926	
1922	19, 867, 72		40, 485, 57
1923	26, 190. 21	1928	37, 611. 79

9. The taxes shown due in the returns filed for the years 1919 to 1928, inclusive, and referred to in the preceding finding were paid by plaintiff as follows:

Year	Date	Payment	Total tax	Your	Date	Payment	Total tax
2919	3/19/30	\$1,548.33	\$1,548.33	1995	3/10/96	\$256.28	
920	3/22/22	1,610.79	1, 610.79	8 1	9/11/26	286.28	
	7/25/22		2, 113, 44		11/16/26	200, 28	1,005.
1923	3/14/28	856.22		1996	3/23/27	1,356.90	
923	9/ 6/23 3/15/24	856, 21 707, 01	1,712.43	1927	8/ 5/27	1,348.90	2, 127.
1946	B/17/24			1947	6/19/26		
- 1	8/12/24	707.01			9/14/28	1,826.35	4,008.
	9/38/24 22/31/24	830, 26 830, 36	2, 826, 05				
1924	9/16/25		2, 828.00	1928	3/15/29	1,027,67	
.,	3/14/25 7/1 /25	694, 45					
	9/23/28	594.45 694.45	2,777.80		13/14/29	1,027.66 1,027.66	4, 110,

Of the tax paid for the year 1920, there was later refunded to plaintiff the sum of \$100.90, together with interest thereon of \$22.02; and for the year 1921 there was similarly refunded the sum of \$765.90 together with interest thereon of \$103.71. Upon an audit of plaintiff return for 1925, the Commissioner assessed an additional tax of \$94.72, plus interest of \$26.52 which plaintiff paid January 90, 1928.

10. The refund claims filed for the years 1932 and 1933 were disallowed on a schedule dated December 14, 1937, and plaintiff was so advised by registered mail in a letter of the same date. The claims for refund for 1934 and 1935

Opinion of the Court were similarly disallowed on schedules dated November 20 and October 20, 1939, respectively, and plaintiff likewise was advised thereof by registered letters on the same dates.

The court decided that the plaintiff was not entitled to recover.

JONES. Judge. delivered the opinion of the court:

Thomas R. A. Hall died February 10, 1910. His estate consisted of two leaseholds of valuable New York property and certain other holdings. His will left the entire estate in trust for his widow, two sons and one daughter, the latter being plaintiff in this case. The widow was to have the income of one-third of the property during her lifetime. The other beneficiaries were to share equally the remaining twothirds of the income and in the event of the widow's death the entire income, and finally in the distribution of the residuary estate.

The terms of the two leases expired May 1, 1938.

On June 8, 1932, the trustees, with the consent of the beneficiaries, sold the lesseholds to the trustees of Columbia University for \$1,017,750,00, payable in 69 equal monthly

installments, ending April 16, 1938. Until the widow's death, which occurred prior to 1932, the trustees distributed the net income (without deduction for depreciation, obsolescence, or amortization) to the beneficiaries as indicated; and after the death of the widow the entire net income to the three children in the same manner In assessing income taxes for the years prior to 1929 the Commissioner of Internal Revenue did not permit plaintiff and other beneficiaries to deduct from income received any allowances for depreciation and amortization. After the enactment of section 23 (k) of the act of 1928, which made specific provision for depreciation applicable to lesseholds as well as other property, the Commissioner of Internal Revenue allowed such depreciation for the year 1999 and following years.

After the sale of the trust property to Columbia University, the trustees, in accordance with a trust provision giving them that discretion, distributed the entire assets, including undistributed income and authority to receive future payments, to the three children, all of whom were adulta

The Commissioner of Internal Revenue, in computing for tax purposes the profits from the sale in 1932 reduced the 1913 basis of value by the amount of the depreciation on the buildings and amortization of the leases from March 1. 1913, to the date of sale. The effect of this action was to increase for tax purposes the amount of the gain under the

Plaintiff filed timely claims for refunds of taxes for the respective years 1932 to 1935 inclusive, on the ground that since depreciation deduction had not been allowed in the assessment of income taxes for the years prior to 1929 she was entitled to recoupment to be applied on the taxes for

the years 1939-1935. Questions: Did the Commissioner of Internal Revenue act correctly in reducing for tax purposes the basis of value of the property sold by considering depreciation, obsoles-

cence, and amortization for the years prior to 1929? Should the Commissioner of Internal Revenue have reduced plaintiff's taxes for the years 1932 to 1935, inclusive, by permitting recoupment, offset, or statutory credit in the amount of the alleged overpayment for the years prior to 1929? Since he did not do so may she now recover such

amounte? Plaintiff's first contention is predicated upon the claim that the taxes levied and collected for the years 1932 to 1935 were excessive on account of the fact that the basis for determining gain on the sale made in 1932 was improperly reduced by depreciation and amortization neither allowed nor allowable for the years prior to 1929.

While depreciation and amortization had not been allowed in collecting income taxes for the years prior to 1999, we think that by the terms of the Revenue Acts of 1928 and 1932 such deductions were properly considered in computing gains on the sale made in 1932, and that the Commissioner properly so held.1

<sup>1</sup> Burnet, Commissioner, v. Thompson Oil & Gas Co., 283 U. S. 301, 308; Huber v. United States, 83 C. Clv. 043, 647; Chisolin v. United States, 85 C. Ch. 199.

Opinion of the Court
The second question presents greater difficulties.

Plaintiff contends that under the common has doctrine of recompant invoked in the case of Hull, Escenter, V. United States, 196 U. S. 247, 241, and in Stene et al., Trustees, V. Company and Company and Company and Company and Company during which depreciation was not allowed, against income states for the years 1932 to 1935, inclusive, during which depreciation on the property for the years prior to 1929 was property which was sold in 1929.

The defendant contends that under the doctrine laid down in McEachern, Administrator, v. Rose, 302 U. S. 56, 59, the statute of limitations prevents such recoupment, offset, or statutory credit.

We do not think the principles set out in Bull v. Britises. States, survey, are applicable to the case at bar. In the Bull case the identical sum of moore was involved, growing out of the same transaction. Two men operating at part-of either, the legal representatives of such decased partner should have the option of participating in the income of the partnership for one year after such death. One of the partners died February 13, 1920. Prior to his death part of the profits had been \$24,000.00 for the year 1930. One the remaining part of the year.

The Collector treated the \$212,000.00 as a part of the setate and collected an entite tax thereon. Thereafter in July 1926 the Collector determined that the \$212,000.00 returned in 1920 should have been treated as income instead. He accordingly assessed a deficiency income tax of \$85,000.00 plus interest for the year 1920 which was paid. Claim for refund was filed and rejected, and suit was filed for refund. The court. held that the \$812,000.00 was unronerly treated

as income, but permitted recoupment of the estate tax erroneously paid, notwithstanding limitation statutes. We quote:

In July 1925 the Government brought a new proceeding arising out of the same transaction involved in the earlier proceeding. This time, however, its claim

Opinion of the Court was for income tax. The taxpayer opposed payment in full, by demanding recounsient of the amount mistakenly collected as estate tax and wrongfully retained, Had the Government instituted an action at law, the defense would have been good. The United States, we have held, cannot, as against the claim of an innocent party, hold his money which has gone into its treasury by means of the fraud of its agent. United States v. State Bank, 96 U. S. 30. While here the money was taken through mistake without any element of fraud. the unjust retention is immoral and amounts in law to a fraud on the taxpayer's rights. What was said in the State Bank case applies with equal force to this situation. "An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the in-debtedness or the mode in which it was incurred is immaterial. \* \* \* In these cases [cited in the opinion) and many others that might be cited, the rules of law applicable to individuals were applied to the United States (pp. 35, 36). A claim for recovery of money so held may not only be the subject of a suit in the Court of Claims, as shown by the authority referred to, but may be used by way of recoupment and credit in an action by the United States arising out of the same transaction.

It will be noted that the two taxes discussed in the Bull case involved not only the same transaction but the identical fund. It pertained to the recoupment of a tax illegal in toto in so fur as the fund was concerned.

In the McEachers case, agree, the taxpayer had sold shares of corporates tock in 1926 for a proist of 5205,000 payable in ten equal annual installments. After his death in 1926 the shadministrot continual to pay for the years whereas he should have reported as income for the year before the shadministration of the sh

The court hald that the Government could not prevent recovery by the taxpayer by pleading a barred claim. We muste:

We may assume that, in the circumstances, equitable principles would preclude recovery in the absence of any statutory provision requiring a different result. But Congress has set limits to the extent to which courts might otherwise go in curtailing a recovery of overpayments of taxes because of the taxpayer's failure to pay other taxes which might have been but were not assessed against him. Section 607 of the 1928 Act declares that any payment of a tax after expiration of the period of limitation shall be considered an overpayment and directs that it be "credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim"; and \$ 609 (a) of the 1928 Act provides that "Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607." These provisions preclude the Government from taking any benefit from the taxpayer's overpayment by crediting it against an unpaid tax whose collection has been barred by limitation.

In the instant case two entirely different periods and two entirely different funds or transactions were involved. The taxpayer sought to offset against a tax properly levied on income arising from sale of property in 1982, what claims were overlevies on income for the several years prior to 1999.

The question is: Do the limitation statutes prevent the allowance of such offset or recoupment?

Section 607 is of limited scope and does not apply to the facts of the instant case,

Section 608 of the Revenue Act of 1928 (45 Stat. 791, 874) is in part as follows:

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—

(a) if made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed;

#### Oninion of the Court

Section 609 of the same act reads in part as follows:

- (b) Credit of barred overpayment.-A credit of an
- overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.
- (c) Application of section.—The provisions of this section shall apply to any credit made before or after the enactment of this Act.

Plaintiff's facta come so squarely within the terms of these two sections when constructed together, that to permit recovery by way of recoupment under the facts as disclosed by the record would be tantamount to judicial repeal of the statutory limitation provisions enacted by the Congress.

The various revenue acts from 1921 to 1932, inclusive, made provision for refund or credit of the overpaid portion of any income tax and set a time limit within which claims for such refund or credit must be filed.<sup>2</sup>

Plaintiff at no time filled a claim for retund of the alleged overpayment of tarse for the year prior to 1929. She and the privilege of filing an application for a retund during hose years and in the event of rejection to file timely suit therefor. Any rights which plaintiff had could have been protected through the remort provided. If the had a right to an allowance for depreciation under the statutes in force at that time it could have been established. If the right to a refund could not have been established under the secondary of the could have been established under the secondary of the provided that the secondary of the provided that the recomment force plaintiff cannot properly claim

If the clear provisions of section 609 do not apply in the instant case it would be difficult to find one in which they

would apply.

If plaintiff is permitted to recover by way of recoupment for distant years, then any taxpayer, so long as he is paying current taxes, may recover by way of recoupment for taxes overpaid in any year, however long past, and regardless

<sup>&</sup>lt;sup>2</sup> Sec. 322 of the Revenue Act of 1978 (48 Stat. 791, 861); Sec. 284 of the Revenue Act of 1926 (44 Stat. 6, 68); Sec. 279 of the Rovenue Act of 1926 (44 Stat. 6, 68); Sec. 279 of the Rovenue Act of 1926 (25 Stat. 6); Sec. 270 of the 1923 act of 1926 (47 Stat. 1926); Sec. 292 of the 1923 act of 1926 (47 Stat. 192, 245); Sec. 292 (47

of any limitation statutes that might otherwise apply. The entire field would be opened up both for the taxpayer and the Government.

We are not unmindful of the merits of the principle of recompent nor of the measure of justice which it permits. But there is also a reason behind limitation statutes. But there is also a reason behind limitation statutes, actions long past. Facts are frequently then difficult of proof. Limitation statutes are enacted for the benefit of the tarpayer as well as the Government. While buy sometimes harsh in their operation, they more frequently operates to hearinstend what night otherwise be almost send properate to hearinstend what night otherwise be almost send for the contract of the

time a finality to tax levy as well as tax adjustment.

At any rate, the Congress, in its discretion and within its
province, has enacted these provisions. We are not privileged to suspend or apply them at will, nor to shape them
to our notion of the ends of justice.

The plaintiff is not entitled to recover and the petition must be dismissed.

It is so ordered.

Madden, Judge; Whitaker, Judge; Littleton, Judge; and Whalet, Chief Justice, concur.

## MORRISTOWN KNITTING MILLS, INC. v. THE UNITED STATES

[No. 45241. Decided February 2, 1942]

On Defendant's Special Plea

Floor-fords far under Agricultural Adjustment Jat.; printdeling, claim not complete with states and regulation—Where plaintiff, a mountexture of hostery, filed a claim for refuse of floor-states tar pold under the agricultural Adjused Sectorical tar pold under the agricultural Adjusel fairmant floresses on the ground that the claim file and comply with the requirements of the Revense Act of 100, under which Act and claim was filed, and that said claim did not enough with the applicable Foreurany Regulations under filed for the complete of the Complete Act of 100, Reporter's Statement of the Case
time did not submit to the Commissioner any evidence in support of said cisim, as required by the statute and regulations;
it is held that, no proper claim having been filed with the
Commissioner in compilance with the statute and pertinent
regulations, the Court of Claims in without jurisdiction and

plaintIffs petition is accordingly dismissed.

Some—The requirement that a claim for refusal be filed with the
Commissioner before illigation may be instituted "in a familiar
povintion of the Revenue Laws." United States v. Felt &
Terrant On. 283 U. S. 290, cited; also Factors & Finance Co.
V. Hutter States. 22 U. Ch. 107.

The Reporter's statement of the case:

Mr. George E. H. Goodner for the plaintiff. Miss Helen Goodner was on the brief. Mr. Scott P. Crampton was of counsel.

Mr. H. L. Will, with whom was Mr. Assistant Attorney General Samuel O. Clark, Jr. for the defendant. Mesers. Robert N. Anderson and Fred K. Dyar were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized under the laws of Tennessee in July 1927. Since that time it has engaged in operating a knitting mill at Morristown. Tennessee.

2. During 1838 and 1934 plaintiff only product consisted infants' long bithed hose made from cotton yars. The style or pattern of the hose varied with the size (count.) of the yars used. Each style was given a number. The row on this cotton per dozen pairs of hose. Plaintiff manufactured only upon orders received in advance. During the time here involved, plaintiff was lenkting approximately 0,000 dozen pairs of hose from 190,000 pounds of yars per 20,000 dozen pairs of hose from 20,000 pounds of yars per 20,000 dozen pairs of hose from 20,000 pounds of yars per 20,000 dozen per 20,000 pounds of yars per 20,000 dozen per 20,000 pounds of yars per 20,000 dozen per 20,000 pounds of yars per 20,000 pounds of ya

month.

3. The Agricultural Adjustment Act (48 Stat. 31), imposed a tax on finor stocks of cotton at the rate of 4.418 cents per pound, effective August 1, 1932. Pursuant to the set and regulations promulgated thereunder, plaintiff took an inventory of all ectors yars and manufactured goods on hand on August 1, 1933. The total inventory consisted of 23,900 pounds of cotton. On August 31, 1933, plaintiff 1939.

made its return on the form prescribed to the Collector of Internal Revenue for the district of Tennesses. It paid the total tax shown thereon of \$1,006.90 in monthly installments of \$264.05 each on September 23, October 28, November 28, and December 20, 1983.

4. On June 30, 1937, plaintiff filed a claim, prepared on Treasury Department P. T. Form 76, for refund of \$1,006.20, the floor-stocks tax paid by it. There was stricken from the printed form paragraph 4 reading as follows:

6. (a) That the amounts of the burden of the floratock states which were borne by the claimant as set forth in column 3 above are true and correct, that the therefore nor shifted such burden, fluredly or indirectly, (1) through inclusion of such amounts by the claimant, every superior of the columnation of the co

In lieu of paragraph 4 plaintiff inserted the words "See statement attached." The statement referred to appeared in Schedule D and read as follows:

It is impossible to determine and prove how much of the tax, if any, was not absorbed by claimant, and claimant believes, and therefore asserts that it absorbed all the tax.

Claimant demands refund of the entire amount paid

Calminit demands Future 1 of the entire amount path because the Supreme Court has held that it was illegally assessed and collected and because any attempt to condition or restrict the refund thereof, by requiring proof that the tax was absorbed by claimant, is unconstitutional and void.

5. Schedules "B" and "C" of the claim (P. T. Form 76) were left blank by plaintiff and no evidence was submitted either with the claim or at any other time in support thereof, except the statement appearing in Schedule "D."

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6. The Commissioner of Internal Revenue rejected the claim for refund by a letter dated September 12, 1938, which states:

Reference is made to your claim filed on P. T. Form 76 for refund of \$1,056.20, floor-stocks tax paid under

the previsions of the Agricultural Adjustment Auct.
To are achieve that all claims for vietual of amount.
To are achieve that all claims for vietual of amount.
Auct. 1910. Section 820 of the Agricultural subject to the provisions of Tile VII of the Berenus
Act of 1900. Section 820 of the Agrovinde that no
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unless the person who paid the tax establishes that (1) he been the harden of such amount and has not leave
and has not shifted useb harden, divectly or imitiretly,
through or by any of the means we from an almost of
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An examination of your claim discloses that paragraph (4) of the affidavit on the face of the claim form has been deleted.

The claim as filed is not founded on the basis that you hore the burden of the tax, and there is no allegation in the claim, nor is there any evidence submitted therein to show that the burden of the amount for which refund is claimed was horne by you and not shifted to other persons within the terms of section 902 of the Act. Since the claim does not conform to the provisions of

section 902 of Title VII of the Revenue Act of 1036 and affords the Commissioner no basis whatsoever to consider on its merits the question as to whether or not the burden of the amount for which refund is claimed has been borne by you and not shifted to others, the Commissioner is without authority in law to allow a refund of the amount claimed.

Accordingly, your claim is hereby rejected in full.

7. Section 6 of the instructions appearing on page 4 of

P. T. Form 76 provides as follows:

6. Amount of claim.—(a) The claimant shall enter in column 3 on the face of the claim form the amount of the burden of the floor-stocks tax borne by the claimant and which the claimant has not shifted to other persons. within the terms of section 902 (a) of the Act. The facts and evidence, together with exhibits and other data showing the amount of the burden of the tax borne by the claimant and not shifted to other persons, 5:10 be made a part of Schedule D. (See paragraph 7:1)

(b) The claimant shall enter in column 4 on the face of the claim form the amount of floor orders tax which of the claim form the amount of floor orders tax which can be considered to the claim form of the claim of the clai

(c) No claim for refund of an amount paid as floorstocks tax under the Agricultural Adjustment Act may be allowed in an amount less than \$10. No refund shall be made or allowed of any amount paid or collected as tax under the Agricultural Adjustment Act to the extent that refund or credit with respect to such amount has been made to any person. (See paragraph 5.)

Section 7 of the instructions appearing on page 4 of P. T. Form 76 provides as follows:

7. Feest and evidence.—The claimant shall set forth in his claim in detail each ground upon which the refund his claim in detail each ground upon which the refund pars a true and complete claim and to present and substantiate by clear and convincing evidence all the other commissioner; failure to do so will result in the disallowance of the claim. The claimant is required to set forth clearly the facts of his claim and is privileged to submit sub-relief widence to that end as he may desire.

8. It was the duty of the Collector, on receipt of plaintiff's claim for refund, to attach to it a copy of the "Inventory and Return" (or floor-stocks tax return), which had theretofore been filed by plaintiff, showing the amount of tax due, and forward it to the Commissioner of Internal Revenue at Washington. The Commissioner of Internal Revenue would then examine the claim and evidence filed therewith and issue instructions to the Collector as to any investigation believed to be necessary or proper in connection with the claim.

9. The examiners of claims in the Washington office believed, from experience, that practically the only method available to the taxpayer to pass the tax on was by an inverse in prices. Hence, in examining a claim they were interested in ascertaining how the sales prices moved after the effective date of the ixx-whether they went up, remained stationary or were reduced. If the examiner found the taxpayer. If there were other factors introduced by the taxpayer affecting the price, these were considered and given does weight.

In the instant case, the Processing Tax Division at Washington rejected the claim on the ground that it did not conform to the provisions of Section 902 of Title VII of the Revenue Act of 1988. This division had no information except that set out in the claim and made no investigation as to the merits of the claim.

10. The Bureau of Internal Revenue did not consider the allegation in the claim as to the unconstitutionality of Title VII of the Revenue Act of 1936, because it believed that unestion was for the courts to decide.

11. Paintiff in testimony before the Commissioner of this Court has presented substantial documentary and oral evidence with respect to the question of whother or not it bore the burden of the floor-stocks tax. This evidence includes plaintiff's sales records from August 1, 1983, to January 13, 1984, its cash journal sheeks, and its orders on hand August 1, 1983, together with invoices of goods sold. 12. The 93-950 nounds of orders in investors on August 12.

1, 1933, consisted of 3,991 pounds in finished goods which were boxed and ready for shipping; 10,859 pounds in yarn in the warehouse and on the machines in process; and 10,000 pounds in "seconds." The seconds are finished hosiery containing imperfections and they accumulate over a period of time.

Reporter's Statement of the Case 13. On August 1, 1933, plaintiff had unfilled orders for 56,000 dozen pairs of hose. These orders would consume 56,000 pounds of cotton varn in their manufacture. Plaintiff had 10.859 pounds of varn on hand and would have to nurchase the rest needed for the manufacture of hose to fill these orders. Some, the amount of which is not shown. had been contracted for. Not all the varn on hand on August 1 would ordinarily be used before other varn later obtained was used because different styles of hose required different sizes (or counts) of varn and each particular stocking required different sizes of varn in the leg, heel, and toe. No evidence was offered as to whether or not the varn on hand on August 1, 1933, contained the usual proportions of the several sizes of varn. Plaintiff did not keep records tracing each pound of varn.

14. On July 17, 1933, the N. R. A. code increases in wage rates were put into effect by plaintif. This increased plaintiff's labor cost by 331/c cents per down pairs of hose. The orders for 50,000 down pairs had been taken before the N. R. A. wages increases went into effect. On or about August 1, 1933, plaintiff began neglecting with its centemens for increases in the contract prices sufficient to retended to the contract prices sufficient to the increase in price ought to the total increase in cost, a few agreed to a lesser increase, and three refused to agree to any increase.

15. Of the orders on hand August 1, 1933, for 56,000 dozen pairs, plaintiff delivered only 6,831½ dozen pairs of hose between that date and January 31, 1934, on which the increased price over the contract price was not enough to cover the whole amount of the increased labor cost and floor stocks tax. The following table shows the increased prices per dozen pairs obtained from that revue of customers.

Dozen pair	mi:			Agree	d price
876				_ 85	cents
15541/		_	 		cents
766			 	 _ 30	cents
2955			 	 . 15	cents

Opinion of the Court All the rest of the hose delivered within that period were paid for at prices sufficiently increased to cover both the additional labor cost and the tax.

 Between August 1, 1933, and January 31, 1934, plaintiff sold 12,258 dozen pairs of seconds at prices ranging from 30 cents per dozen to \$1.15 per dozen. These prices were, in most cases, not greater than the prices for which such goods had sold before August 1.

17. Paragraph 4 in Form P. T. 76 was eliminated from plaintiff's claim and the statement appearing in Schedule D attached by plaintiff on advice of the attorney for the hosiery trade association of which plaintiff was a member.

The court decided that the defendant was entitled to judgment upon its special plea and that the petition of plaintiff should be dismissed.

Madden, Judge, delivered the opinion of the court:

Plaintiff sues to recover \$1,056.20, paid as a floor stocks tax under the Agricultural Adjustment Act (48 Stat. 31. 40), which tax the Supreme Court of the United States held in United States v. Butler, 297 U. S. 1, had not been constitutionally levied. The Revenue Act of 1936, 49 Stat. 1648, enacted after the Supreme Court's decision, provided, in language hereinafter quoted, for the return, in some instances, to the taxpaver of such taxes. Plaintiff, on June 9, 1937, filed a claim for refund, which was promptly rejected by the Commissioner of Internal Revenue on the ground that the claim did not comply with the requirements of the 1936 Act and applicable Treasury Regulations. In September 1940, this suit was begun.

The defendant has filed a special plea urging that the court does not have jurisdiction of the case because no proper claim for refund was made to the Commissioner. Plaintiff replied to the special plea, urging that its claim for refund did comply with the statute, and that to whatever extent it did not comply with the Regulations, those regulations were ultra vives the Commissioner and it was not necessary to comply with them. A hearing was held Opinion of the Court
on the special plea and the facts recited in our findings
were proved.

Pertinent provisions of the Revenue Act of 1936 are as follows:

SEC. 902. CONDITIONS ON ALLOWANCE OF REPUNDS.

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for under section 906, as the case may be-(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control. or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing: (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exisits whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift

(b) That he has repaid unconditionally such amount to his vendee (1) who hore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsovere.

SEC. 903. FILING OF CLAIMS.

the burden thereof: or

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the ensetment of this Act, and prior to July 1, 1987, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon

in support of such as the Servi in support of such as the Commissioner is authorized to prescribe by requisitions, with the approval of the Secretary, the Regulations, with the approval of the Secretary, the such as the su

SEC. 916. RULES AND REGULATIONS.

The Commissioner shall, with the approval of the Secretary, prescribe such rules and regulations as may be deemed necessary to carry out the provisions of this title. (49 Stat. 1648, 1747, 1755.)

Treasury Regulations 96, promulgated under the 1986 Act, and applicable to plaintiff's claim, were as follows:

Arraca: 201. Claims—Form and where to fite— Claims for the reduced of tax shall be made on the preclaims for the reduced of tax shall be made on the precordance with the instructions contained on the form and in accordance with the previous of these regulations. Each claim (except claims for refund of concellator of internal revenue for the district wherein the claims at has his principal place of business. If United States, the claim shall be light with the collector of internal revenue located at Baltimore, Mo. Copies of the prescribed forms may be desined from any claim.

sector of inferinar evenues. As m. 2002. Facts and evidence in support of claimans and see forth in detail and under oather and the section of the composition of the

The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

Arr. 304. Contains a factors and the respect for the contains a factor burden with respect for the contains a factor of the fact

Plaintiff filed its claim, prepared on Treasury Department P. T. Form 76. On the form was an affidavit containing the following paragraph:

4. (a) That the amounts of the burden of the floorstocks taxes which were borne by the claimant as set forth in column 3 above are true and correct; that the claimant has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, through inclusion of such amounts by the claimant. or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which such tax was paid; or (2) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amounts, be reimbursed therefor, or may shift the burden thereof; and (b) that the data and statements submitted in and made a part of Schedule D are true and correct.

This paragraph was deleted by plaintiff from the form and the words "See statement attached" were substituted. The statement, attached to Schedule D on page 3 of the form, was as follows:

It is impossible to determine and prove how much of the tax, if any, was not absorbed by claimant, and claimant believes, and therefore asserts that it absorbed all the tax.

Claimant demands refund of the entire amount paid because the Supreme Court has held that it was illegally assessed and collected and because any attempt to 552

condition or restrict the refund thereof, by requiring proof that the tax was absorbed by claimant, is unconstitutional and void.

Among the instructions appearing on page 4 of P. T. Form 76 were the following:

6. Amount of claim—(a) The claimant shall order in column 3 on the faces of the claim form the amount of the burden of the floor-stocks tax borns by the claim form the same of the claim form the same of the claim form of the claim form o

parameters of midzene. The chimant shall set forth in his claim in detail such ground upon which the refund is claimed. It is incumbent upon the chimant to prepare a true and complete dum and to present and substantiate by clear and convenient to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim. The chimant is required to set forth early the fact on the Commissioner; failure of he control to the control of the contro

Plaintiff submitted no evidence to the Commissioner of Internal Revenue either when it filled in claim, or at any court on defendant's special ples, plaintiff has submitted a considerable amount of written and oral evidence, including its sales records from August 1, 1938, the day the tax was imposed, to January 31, 1994, its cash journal sheets, its caler of the contract of the

goods boxed and ready for shipping. Each dozen pairs of stockings weighed a pound. Plaintiff on August 1, 1933, had unfilled orders for 56,000 dozen pairs of stockings. On July 17, 1933, plaintiff put into effect ware increases

required by the National Industrial Recovery Act, which increased its labor costs per dozen pairs of stockings, and per pound, by 33½ cents for stockings manufactured after that time. The floor stocks tax, which was laid on August 1, amounted to 4.4184 cents per dozen, making a total increase due to these two causes of 37.9184 cents per dozen.

Plaintiff, on or about August 1, negotiated with its customers, whose orders for first grade stockings it had theretofore accepted at specified prices, for an increase in those prices sufficient to cover its increased labor costs and taxes.1 In most cases it was successful. As to only 6,531¼ dozen pairs of stockings out of the 56,000 dozen ordered was it obliged to fill its orders for a price leaving it to bear any of the increased labor cost and tax. As to the customers who would not increase their contract prices by enough to cover the whole amount of these additions, many of them did increase their prices by lesser amounts ranging from 35 cents down to 15 cents per dozen and purchasers of only 280 dozen pairs refused any increase whatever. The following tabulation shows the action of customers who refused to completely relieve plaintiff of its added labor and tax nnefe

Dozen pairs:	increase
876	35 cents.
1,5541/2	32½ cents.
705	20 cents.
2,955	
390	

Plaintiff was, at the time in question, knitting some 20,000 dozen pairs of stockings from 20,000 pounds of yarn per month. As we have seen, out of the 56,000 dozen pairs for which plaintiff had orders on August 1, 1835, it secured increased selling prices of at least the amount of the labor

As to some 49,000 dozen pairs of these stockings, plaintiff would not have any tax to pay, but it would probably have to pay for its yarn a price increased by the amount of the tax, if the yarn was contracted for after the tax became imminus.

Onlaion of the Court cost increase and the tax as to all but 6.5311/4 dozen pairs. As to only 10,859 pounds of yarn had plaintiff paid any tax which it might possibly recover. Only by assuming, contrary to all probabilities, that the 6,5811/2 dozen pairs were made out of the 10,859 pounds of varn taxed to plaintiff, would plaintiff be entitled to a refund as to all those pairs. If, more in accord with the probabilities, we should apportion the 10,859 pounds of taxed yarn to the 56,000 dozen stockings ordered, it would show a proportion of x:6.531::10.859:56.000, the solution of which would give 1,388 as the number of dozen pairs on which plaintiff had borne the tax, in whole or in part. But still better, the exihibits in the case seem to show that from plaintiff's records it would be possible to relate the 10,859 pounds of vara taxed to the 6,5311/2 dozen pairs by applying a "first in, first out" rule of thumb which would be still more accurate. As to the taxed yarn, then, that evidence shows that as

to  $4827\frac{1}{2}$  ( $10.889 - 6531\frac{1}{2}$ ) of the 10.889 pounds, plaintiff did not bear the burden of the tax, and as to the remainder, the evidence shows that the very great probability is that only as to about one-fifth  $\left(\frac{10.889}{56,000}\right)$  of it, did it bear

any of the burden, which approximations could have been reduced to greater certainty by evidence in plaintiff's possession.

As to the 8,001 dozen pairs of stockings which were boxed and ready for chipment on August 1, plaintiff has introduced no evidence as to whether or not they were among the goods shipped in response to unfilled orders on hand on August 1, as to most of which it had obtained price increases. As in the case of the taxed yarn, plaintiff could, apparently, have given information on this question.

apparently, nave given information on this question.

The evidence as to the 10,000 pounds (storms) of seconds on which plaintiff paid the tax is that it sold in the six months period following the tax along, 2,2258 doesn pairs of the price of the paid of the price of the paid of the price of the been selling the same styles for before that are was imposed. The record is complete except that it does not show, what would be probable, that in general, seconds were sold in about the order in which they were

95 C. Cts.

made, and that therefore the taxed seconds were sold, or were probably sold, within the period. Plaintiff's president and manager, who was in active charge of the business when the tax was laid, when the refund claim was filed, and at the time of the hearing, could no doubt have given information as to that practice.

Plaintiff urges that the record shows that the question of whether plaintiff had or had not passed on the tax to its purchasers was a question which it was impossible to answer, and that therefore, it is entitled to a refund of the tax without having answered it.

We do not find here impossibility of proof of a sort which would prevent justice being done between the taxpayer and the government because of a want of evidence, and the government because of a want of evidence, mentation to the Commissioner would have been at full and satisfactory as would be usual in this type of case, and that there is no more reason why it should have been withbeld from the Commissioner in this than in any other case, the commissioner in the state of the state of the commissioner in the state of the plaintiff contends, it is not necessary to construct the 1906 statute to ascertain what Congress intended if proof should be impossible, nor to determine what constitutional problems might be raised, nor how they should be resolved, if the Congress intended to dray recovery to a taxpayer when

The real reason, as it seems to us, for plaintiff's refused to comply with the statute and the Regulations is to be found in its theory, or that of the trade association which furnished the language of the refused, that having paid the illegal tax, it was entitled to recover it with no questions asked as to whether it had passed it on. It reduced to furnish the evidence because it regarded it as immaterial. See The State of the Complete of th

The requirement that a claim for refund be filed with the Commissioner before litigation may be instituted "is a familiar provision of the Revenue Laws." United States v. Felt & Tarrant Co., 283 U. S. 269, 272. The practical

<sup>\*</sup> Compare Annisten Manufacturing Co. v. Davis, 201 U. S. 237.

purpose served by ii, viz, the disposition of most of such claims by departmental action and without Highgation, has been stated by this court in Factors & Finance Co. v. Distell Sistes, 7a. Cl. 8. Viz, 171. Th. Gricuito Courts of Appeals for the eight and satch Grouits have, respectively in the cases of Lew Winner of Co. v. Commissioner, 11F. (2d) 33, and Temestere Consolidated C. Co. v. Commissioner, 11F 27, (2d) 845, held talk claims for return destantially identically in the Commission of the thirt of the Commission of the thirt is claim in court. We arraw with those decisions.

We conclude that plaintiff, having refused to comply with the requirements of the statute and with the valid regulations of the Department in the filing of its claim, has no right to be heard here upon that claim.

The defendant's Special Plea is therefore sustained, and the petition dismissed. It is so ordered.

Jones, Judge; Whitaker, Judge; Littleton, Judge; and Whalet, Chief Justice, concur.

## C. Y. THOMASON v. THE UNITED STATES

[No. 4370]. Decided January 5, 1942. Plaintiff's motion for new trial overruled April 6, 1942]

# On the Proofs

Georement contract; detay in connection with colorer contraction of Lake Olecchoos—Where placific intenset into a contract of Lake Olecchoos—Where placific intenset into a contract late from Lake Olecchoos in Firstein, to control the free; of late from Lake Olecchoos in Firstein, to control the free; of water in the histo as to their it would be explorate for anythering and not to high as to their the recovering institute with the first intenset in the contract of the contract of the lake was the contract of the contract of the contract of the contract that the wood entails mean of the contract it, and the entail shelling which sight have penetrated the rock would have the contract of the contract it, and the entails are shelling which sight have penetrated the rock would have the contract of the side of the contract of the contract is contract. Reporter's Statement of the Case cofferdam; it is held that the resulting delay and extra expense were not the fault of defendant, and plaintiff is accordingly not entitled to recover.

Some.—A notation on a drawing showing the contour of the lake bottom and the type of soil which a countrator might expect to find there, and showing the surface of the water as a certain depth above sea level, did not amount to an agreement by the defendant that the water would be maintained at that depth.

The Reporter's statement of the case:

Mr. Warren E. Miller for plaintiff.

Mr. John B. Miller, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant.

The court made special findings of fact as follows:

2. Plaintiff brings this suit for damages in the sum of \$11,002.13, of which \$2,000 represents liquidated damage assessed against plaintiff and \$8,102.13, reduced in plaintiff's brief to \$4,007.03, is alleged to be the extra cost of construction on Culvert No. 8 owing to an increase in lake elevation from the elevation shown on the drawings and set forth in the specifications of the contract.

3. Contained in the invitation to bid was a direction that bidders visit the site of the work and familiarize themselves with conditions, and notice was given that samples of borings from the culvert sites were open to inspection at the Engineer's Office of Clewiston Floride

The provision read as follows:

Investigation of conditions.—Samples of borings taken at the culvert structure sites are on hand at the U. S. Engineer's Office, Clewiston, Fla., where they should be

Reporter's Statement of the Case inspected by prospective bidders. It is expected that hidders will visit the site and acquaint themselves with all available information concerning the nature of the material that will be encountered in the canal and lake beds, the depth to which it may be necessary to excavate in order to secure satisfactory foundations, the possibility that the lake or canal bottom and/or banks will change from natural causes prior to or after commencement of the work and the local conditions, having a bearing on transportation facilities and handling and storage of materials. Failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder of assuming all responsibility for improperly estimating the difficulties entering into the cost of performing the complete work as required. 4. The contract required that the contractor proceed with

the work ten days after notice so to do and two hundred and forty calendar days was designated as the time allowed to complete the construction work. On November 8, 1938, notice to proceed was given, thereby fixing July 6, 1934, as the completion date, being two hundred and forty days from the receipt of the notice. Actual work was started on December 2, 1933.

5. Lake Oiseschobes is a large fresh water lake situate in the lower entral part of Florida, sixty miles west of Palm Beach and seventy miles east of Fort Myres. The from 7½, to 12 feet. The country currounding the lake, known generally as "Evergledes," is extremely flat and has an elevation of from 1 to 18 feet above seas level. The lake covers an area of approximately 720 to 750 square miles, of the miles of the form set to west.

In the Florida latitude the yearly rainfall is large; at times as high as 18 inches have been recorded in a month. During the rainy sesson, from June to November, the lake, prior to the improvements involved herein, usually reached high levels and overflowed the usual banks, particularly over the southern boundaries of the lake, causing great damage to crops and property. The periodic buricane conditions which sweep Florids and the Olscedobes region if coincident with a high water of the periodic pe

6. Prior to the time the Army Engineers took over the problems of Lake Okeechobee in July 1930, the St. Lucie Canal was built, which provided an outlet from the east side of the lake extending to the Atlantic Ocean at the town of Stuart.

This canal varies in its capacity according to the height of the water in Lake Okeechobee, i. e., at a lake stage of 19 its capacity is 7,000 second-feet, at lake stage 18, capacity 5,000 second-feet, and at stage 14, 3,500 second-feet. Before the contract in the present suit was entered into.

there were six other small canals to or from Lake Okechobee, but except for the Caloosahatchee Canal whose capacity was 509 second-feet at high elevations of the lake, none of such canals was effective as an outlet for high water stages of the lake and they actually discharged water into the lake a tlow-water stages.

7. The purpose of the St. Lucie Canal and the Calcosabatchee Canal, as well as the smaller drainage canals, was to regulate the height of the water in Lake Oksechobee so that flood damage would be minimized. By closing the canal gates during the dry season and by opening them during the rainy season, a partial control of the lake elevation could be maintained.

 The United States through the Engineer Corps had control only of the St. Lucie Canal at the time plaintiff's contract was under progress.

The maintenance of navigability of Lake Okeechobee and the canals was the most important consideration in the control of the water depths. When the lake elevation was Reporter's Statement of the Care
below 14 the navigability of the lake and its canals was
impaired and correspondingly when the lake elevation rose
above 17 the adjoining country was flooded and agriculture
was seriously affected.

10. Only a relative control was possible by the United States, and in 1933 and 1934 the lake elevation frequently rose above 17 feet and fell below 14 feet. The only method or system employed to control the lake elevation during 1933-1934 was to lower the lake to a 16-foot elevation on September 1 and to regulate the outflow by anticipating how

much water would be likely to flow into the lake from month to month thereafter during the rainy season.

11. There was on file in the office of the District Enginees at Jacksonville, Florida, records of the lake electrions from the year 1926 to 1933 taken and recorded monthly, but the direction to bidders to wisit the site, familiarist themselves with conditions, and notice that borings were available at the Engineers Office at Clewiton, Florida (esse finding 3, supra), made no mention of nor advised that such record were available at the Jacksonville Office of the District

Engineer. 12. Plainti:

12. Plaintiff visited the site of the work in September or October 1933 before making his bid. He was shown the sites of some of the culverts by Government men and was directed to other culvert sites.

The center lines of the culverts were marked by flage, out in the water of Lake Okeechobes and others on the bank of the lake. There is some evidence that one or more of the flage had been knecked down or displaced at the time plainiff inspected the sites, but there is no evidence as to which one of the culverts was so affected or whether the inshore or offshore flag was so displaced.

The elevation of the lake at the time of inspection by plaintiff was 16.9 feet but there was no gauge or marking at any of the culvert sites indicating this level. At the time of this inspection the site of Culvert No. 3 was entirely covered by water, the elevation of the lake being higher than when work actually commenced on this Culvert. Plaintiff know

by water, the elevation of the lake being higher than when work actually commenced on this Culvert. Plaintiff knew that the elevation of the lake at the time of his inspection was 16.9 feet or more. He thought that it was 17.5 feet. 13. The main contention of plaintiff in this case centers about the data contained in sheet 15 of the contract drawing, plaintiff's exhibit 1, which by reference is made a part of these findings. This drawing shows the location of Culvert No. 3 with respect to the lake shore and the contour of the lake area at and surrounding the culvert.

The drawing with the secompanying data is dated Octo-1939. On the upper right hand corner of the drawing is a sectionalized profile of the lake taken on the center inse of Culvers No. 3. Information is given not only as to the lake profile, but also the material composing the bed of the lake as for example the notations "Muck and add Loes Rock", "Send and Muck," and "Muck." There is also shown Water Elev. 193. "on, a dotted law, entitled "Surface of Water Elev. 193." on.

14. Plaintiff contends that the legend "Surface of Water. Elev. 13.9" appearing on this drawing was relied upon by him as the depth expected to be found and maintained at the site of Culvert No. 3 and that acting upon this data his bid was prepared and the work carried on.

The legend was not intended by the defendant to be an agreement that the water level would be reduced to and maintained at that elevation. Plaintiff had no reason to assume that it was so intended.

15. The specifications set forth in paragraph 6 the water depths that can be expected at a given elevation of Lake Okeechobee to wit:

6. Physical data—Lake Oknechobes itself is an inland fresh water lake approximately 700 quare males in area, centrally located in the lower peninsula of Florida, about 60 miles west of Falls Bench and 70 miles sest of Fort of the peninsula of Florida, about 600 miles west of Falls Bench and 70 miles sest of Fort through the Calabotechee River and Canal is about 25% feet to Morre Haven at a lake stage of 140 feet. From the east coast the lake can be reached through the St. Leet River and Canal with a controlling depth of 6 Leet River and Canal with a controlling depth of 6 careful to 30 feet and the length to 150 feet. All depths given above are based on lake elevation of 1410 feet above.

mean low water, and are referred to Punta Rasa datum.
There are several towns near the sites of the work;
they are Moore Haven, Clewiston, Lake Harbor, Belle

Glade, South Bay, Pahokes, and Canal Point. Each is connected with the others by paved highways and has rail connections. Clewiston has connection with the lake by a channel 40 feet wide and a depth of 6 feet at lake elevation of 14.0 feet. Paved highways for motor-truck or tractor hauling lead to and/or are adjacent to all culverts.

The lake stage at 14 feet in this specification was given as a datum point from which the navigable water depth of the lake and canals could be readily computed by the contractor to enable the necessary floating equipment, i. e., dredges and barges, to be moved to the sixt of the work as required. Plaintiff had no reason to assume that it was given as an agreement to maintain a 14-foot level of water.

16. The specifications, as amended by addenda, dated September 15, 1933, also contain certain requirements as to the cofferdams surrounding the proposed culverts.

2-01. Cofferdams.—(a) General.—The entire work at each site shall be constructed within a single cofferdam, or cofferdams may be built to enclose such sections of the work as may be approved by the contracting officer.

(b) Type.—Any type of cofferdam may be used, sub-

ect to the approval of the contracting officer, provided. however, that the cofferdam shall provide protection to an elevation of plus 22.0 and have stability at least equal to that of a box-type cofferdam with a width at its base throughout the length at least equal to its height, with adequate protection against seepage water. Bidders shall submit with their bids a statement with necessary drawings or sketches showing type of cofferdam proposed to be used. After the award of the contract, the contractor shall submit such further detailed plans as the contracting officer may require before construction is started; but approval of such plans shall not relieve the contractor of his responsibility for the adequacy of the cofferdams. The contractor may propose separate coffers, installed either successively or simultaneously or may propose a single coffer surrounding the entire area The entire work may be coffered off by earth dams, with such sheet pile cut-offs as may be necessary to prevent the entrance of water.

The matter of the lake elevations was also referred to in par. 8 of the General Specifications. As amended by adReporter's Statement of the Case denda dated September 15, 1933, that paragraph contained the following language:

8. Flooding of Cofperdams.—(a) In the event that work remains to be done and is actually in progress within the cofferdam constructed to elevation plus 220, at a given structure, and a hurricane flood overlops the coffeedam when built to full height, an allowance of \$500 will, subject to the following, be made to the contractor for the structure so affected upon full resumption of work within the cofferdam \*

17. The defendant did not agree to maintain a definite elevation of Lake Okeechobee during the progress of the work on plaintiff's contract.

18. Construction of the cofferdam at Culvert No. 3 was commenced on March 19, 1984. At that time the lake elevation was 15.8. The area in which the culvert was to be built was entirely under water. The type of cofferdam under construction was earth filled, that is the muck or earth available at the site was placed within and against a one-inch plank sheathing which was attached to posts or piles of  $2 \times 6 \times 6 \times 2 \times 6$  dimension driven into the bottom of the lake.

This earth or muck which was available as a filling material at Culvert No. 3 was a mixture of light soil and vegetable matter. When wet or mixed with water it was a light, soupy material with little inherent stability.

After the box type cofferdam was completed, an attempt

After the box type collectam was completed, an attempt to pump out the water from it was made on April 19, 1884. When the water level within the cofferdam was lowered about 3 feet, leaving about 4 feet of water still within it, the dam broke.

Beginning on May 2, the dam was repaired, but on May 8 gain gave way. It was repaired on May 9 and May 10, and again on May 11 it broke. Repairs were again started, another break occurred on May 16 and repair and excavation continued up until May 26.

From May 26 to May 31 work was stopped on the dam awaiting the arrival of timber for cribbing to be used on the

From June 1 to June 11 repairs were made consisting of placing arched cribe in the cofferdam until with reinforcing rock placed on the inside of the dam, it held and was effective. 19. Prior to the failure of the cofferdam at No. 3 Culvert, plaintiff's inspector on March 21, 1984, in his daily report to the home office stated: "It looks as though we will have to use steel sheeting for this cofferdam."

Steel piling was employed successfully on projects in and sout Lake Okeechobee and it could have been used successfully on cofferdam No. 3. The rock ledge beneath the soft mud at the bottom of the lake was too hard to be penetrated by wooden studding.

It is a much more expensive material than wood or other piling and plaintiff testified that because of extra cost it was not used by him on this dam.

20. There is no dispute regarding part of the time for which the cotts of repair to complete the collectain are to be computed, that is, from May 11 to June 11. The plaintiff, however, claims that the operation was not consummated until June 18 and that costs are to be so rekenced. From the daily reports of defendant from May 11 to June 18, it appears that the period of repair and construction of the cofferdam at Culvert No. 3 embraced the

21. The cost of this work was as hereinafter set forth:

period from May 11 to June 18 inclusive.

Rock, 100 tons	281.00
Pumping	380, 00
Crane and drugline	818. 17
Insurance	58, 29
	_

#### 3, 670, 35

In assortaining the cost for the extra work on cofferdam No. 8, by agreement of the parties a Government suditor visited the office of plaintiff and with plaintiffs senistance repair of the cofferdam. An agreement as to the base cost per day for labor, pumping, and insurance was reached, but the time of rock used in the cofferdam was disputed as well as the allowance of cost for the crane and draglines. The record discloses only 100 tons of rock delivered to the

The Bucyrus crane had an established rental value of \$4.00 per day but the P. & H. crane owned by the contractor, after Reporter's Statement of the Case allowances were made for cost, depreciation, oil, and gas, justified a daily average cost of operation to the contractor of \$1.97.

### CLAIM FOR REMISSION OF LIQUIDATED DAMAGES

Notice to proceed was given the contractor November
 1933, and the completion date of the contract was determined to be July 6, 1934.

The General Specifications provide, par. 8, page 26, that the contractor fails to complete the work within the period so fixed, he shall pay \$100 per day to the United States, as 1904, because of conditions making the use of piles necessary for the foundation work on Cubrett No. 4-A. This order allowed 45 calendar days in addition to the original inte limit set. An additional 24 days was also allowed plaintiff because of the deby by the Government in practing and having the change order approved. All told of the contract were granted to plaintiff, which determined the completion date to be Spetember 31, 1954.

These extensions were sufficient to cover the delays they were intended to cover.

Twenty-nine days after September 13, 1934, to-wit, on October 12, 1934, the work on the culverts was accepted by the United States and the sum of \$2,900 liquidated damage was withheld from the final settlement nayment.

23. According to plaintiff plan for progress on the culverts, scawation work of Culvert No. 1 was to begin November 27, 1938 and on Culvert No. 2 on January 1, 1934. March I, 1934 was the original date set for excavation on Culvert No. 8 and on Culvert No. 4-A March 15, 1934. Excavation on all culverts was to be completed by April 1, 1934.

on all culverts was to be completed by April 1, 1934.

The first work on the contract was on Culvert No. 1 on

December 2, 1933, when excavating began.

Excavation work was begun on Culvert No. 2 on January 31, 1934, thirty days later than the progress schedule laid out, and on Culvert No. 3 on March 19, 1934, eighteen days later than the schedule. Work on Culvert No. 4-A was Reporter's Statement of the Case started on April 28, 1934, forty-four days after the date set in plaintiff's progress schedule.

24. Paintiff was not delayed by the defendant in the performance of the work called for by the contract. The failure of the cofferdam No. 3 was the cause of the contract. The failure of the cofferdam No. 3 was the cause of the contract only difficulties. The factors contributing to the failure were the instability and fugitive nature of the "muck" which is plaintiff used in the earth cofferdam, the type of offerdam first used, which, in view of the conditions of work encountered more interesting the contraction of the conditions of work encountered more discussed.

Because of the inadequacy of this cofferdam and its many failures, the utilization of plaintiff's equipment of cranes and draglines could not follow the progress schedule as to the various culverts. This resulted in further delay.

#### LABOR CONDITIONS

28. Delay is attributed by the contractor to the fact that inexperienced, incompetent, and incapable workness were supplied by the United States Employment Service. In the immediate supplication of Lake Josenschee there were from the same service. Plaintiff employed shoot 90 to 60 me and it was difficult to get efficient lador. The inefficient had to be trained by plaintiff. The extent to which labor imefficients affected the progress of the work is not proved. The labor supplied to plaintiff was sefficient as was to be expected from the sources from which plaintif ageed, in his contract,

#### NIGHT WORK

26. Plaintiff secured the approval of the contracting officer to work at night on Culvert No. 3, but the prevalence of mosquitoes defeated this plan. The presence of the mosquitoes was not an unforeseen condition. No specific delay is proved to have been the result of the failure to work at night.

27. Plaintiff did not file any written protest with the contracting officer as required by Par. 1-01, page 7, of the specifications, which reads:

Claims and Protest.—If the contractor considers any work to be outside the requirements of the contract, and considers any record or ruling of the inspectors or contracting officer as unfair, be shall sak for written instructions or decision immediately and then file a written protest with the contracting officer against the same within ten (10) days thereafter, or be considered as having accepted the request or ruling.

The court decided that the plaintiff was not entitled to recover.

Manner, Judge, delivered the opinion of the court: Plaintiff seeks to recover from the defendant \$2,900, the

amount the defendant assessed against plaintiff for liquidated damages for 29 days delay in the competion of work done by plaintiff for the defendant under a contract, and in addition, damages of \$4,087.39 alleged to have been caused plaintiff by the defendant's breach of contract.

The contract was for the building of six culverts, outlets

from Lake Okeechobes in Florida, to control the level of water in the lakes to that it would be adequate for navigation and not so high as to flood the surrounding land. The context was entered into October 27, 1928, and plaintiff well to begin work within 10 days of receipt of notice to proceed to begin work within 10 days of receipt of notice to proceed and to complete the work within 29d days thereafter, except as the time might be extended. Notice to proceed was given on November 8, 1900.

Phintiff had difficulties with his cofferdam on the No. 3 culvest. He started work there on March 19, 1934. The water at the location of this culvert and within the areas of the cofferdam varied from zero to shout six and one half feet in depth, with an average depth of about six and one half feet in depth, with an average depth of about six and one half feet in depth, with an average depth of about six and one half feet in depth, with a severage depth of about 10 cm six one inch board sheathing was attached to the posts to form the sides. The box so made was filled with the muck available nearly. When on April 16 the water was pumped out of the box, the box collapsed when the water level had been converted about three feet. Attempts to vepair were made, followed by successive faithree until on June 11, rock having followed by successive faithree until on June 11, rock having could be completed.

Plaintiff claims that the reason for the difficulties at No. 3 culvert was that the defendant, in the specifications which Were a part of the contract, agreed that the level of the surface of the water at the site of this culvert would be 13.5 feet above as level, unless it was raised or lowered by natural above as level, unless it was raised or lowered by natural when planniff did his work; that this higher level was artificially maintained by the defendant through the exercise of controls over the escape of the water of the lake into an outlet cansi; that if the water level had been as agreed upon, the average head of water to be withstood by the coffernam would have been two and one-laft feet instead of five feet; and that the dam as conscreted would not have failed, which water level would be at 13.6 feet unem to following facts.

First. A drawing prepared by the defendant to accompany the specifications forminde to bilders showed the contour of the land and the location of the cannil, the proposed leves, and the proposed No. 3 culvert. In the upper right hand corner of the map was a small drawing labeled "Profile Along Classification Determined by Probings." The map showed the contour of the bottom of the lake at this location, the nature of the substance at and under the bottom as "Mack and Loose Rock," "Sand and Muck," and "Muck," and "Muck," at points. The drawing showed a horizontal line near the top with the legend "Surface of Water Eiev, 13.9." The whole defendant's consulting empires."

Second: On page 2 of the printed specifications, under the heading "Physical Data" appears the following language quoted in finding 15:

6. Physical data—Lake Okoschobes itself is an inland fresh water lake approximately 750 aquare miles in area, entrally located in the lower peninsuls of Florida, about 60 miles west of Palm Beach and 70 miles and 70 Ford Spress. This controlling depth on the control of the peninsuls of the peninsuls of the control of about 29½ feet to Moore Haven at a lake stage of 104 feet. From Moore Haven to the lake there is a controlling depth of 3 feet through the Moore Haven per present cann at a lake stage of 140 feet. From the east and Canal with a controlling depth of 6 feet, but Propasses of the two locks limit the width of craft to 50 feet and the length to 10 feet. All opting given above are based on lake elevation of 140 feet above mean low are based on lake elevation of 140 feet above mean low are seven towns near the sites of the work; they are Moore Haven, Clewiston, Lake Harbor, Belle Glade, South Bay, Falooks, and Guan Plorin. Each is concurred to the contract of 140 feet. Paved highways for motor or called the contract of 140 feet. Paved highways for motor or cultwerts.

As to the second of these points, we see in it no basis for plaintiffs claim that the defendant agreed to maintain a water level as low as 14 feet. It was a truthful statement as to what depth of water in various approaches to the lake might be expected for bringing in materials, for example when the water in the lake was at a 14-foot level.

We also think that the notation on the drawing showing the contour of the bottom of the lake and the type of soil which a contractor might expect to find there, and showing the surface of the water as 13.9 feet above sea level, did not amount to an agreement by the defendant that the water would be maintained at that depth. It was natural for the drawing to show the water level as it was when the soundings were made, as it was a scale drawing and unless it was to be left open at the top it would have to show the surface somewhere. Plaintiff testified that at the time he looked at the site in September or October 1933 before he made his hid he knew that the level of the water was about 17.5 feet. In those circumstances he had no reason to interpret the notation on the drawing of 13.9 feet as an agreement by the defendant to abandon its control of the level in the lake and permit it to recede to 13.9 feet.

Furthermore, plaintiff agreed in the contract to build his cofferdams so as to "provide protection to an elevation of plus 22.0" feet. He says that this agreement is immaterial to the issue here; that if he did not comply with that part of the agreement and if his cofferdam was overtopped by water, he would have to stand the loss himself, whereas if he did as he

Opinion of the Court agreed and built to a 22-foot height and still the water overtopped the dam, the defendant would compensate him. We think that the words and intent of the agreement are incompatible with plaintiff's claim that the defendant should compensate him for the expense and excuse him for the delay caused by the collarse of his cofferdam when the water level was only about 16 feet.

Even if the defendant had agreed to permit the water level to go down to 13.9 feet while plaintiff was doing his work, and had instead maintained it at 15.9 feet, we think plaintiff could not recover because he has not proved what part, if any, of his difficulties and expenses at Culvert No. 3 were caused by the additional two feet of depth. If the water level had been two feet lower, the average depth would have been about three feet, but the depth in some places would have been four and one half feet. Plaintiff's cofferdam as constructed collapsed when the water level inside it was lowered three feet, hence it would have collapsed under the more than 3foot head of water which it would have had to withstand at some places even if the level had been the lower one.

Plaintiff's difficulties at Culvert No. 3 really resulted from the fact that the mud in the bottom of the lake was light. and afforded little support to the stude which were driven into it; the rock ledge on which the mud rested was so hard that the wooden studding would not penetrate it at all; and steel sheeting which might have penetrated the rock would have been too expensive for the price that plaintiff bid on the job. As a consequence of these factors, plaintiff's attempts were futile until he brought rock in barges to support the cofferdam.

We conclude, therefore, that the defendant is not respon-

sible for the delay and expense incurred by plaintiff at Culvert No. 3.

We do not consider whether plaintiff was denied the right to a decision of the contracting officer on the question of an extension of time, since, in view of what we have said, the result would not be affected thereby. Neither do we consider what would be the effect of an admission by the defendant that no actual damage resulted from the delay in completing the work, since there is no such admission. We think Reporter's Statement of the Case
that the extension of time given plaintiff on account of the
change order on Culvert No. 4-A was adequate.

It follows that plaintiff's petition must be dismissed.

It is so ordered.

Terms Indon.

Jones, Judge; Lattleton, Judge; and Whalet, Chief Justice, concur.

WHITAKER, Judge, took no part in the decision of this case.

FISCHBECK SOAP COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 44868. Decided January 5, 1942. Defendant's motion for new trial overruled April 6, 1942]

## On the Proofs

Excise text, folder soog.—Where it is established by the evidence that the soop anametercured by the plaintiff and sold under the name "Queen Lip" might be used for cloid purposes but its predominant use is an a laundry soop only and advertised and and as small; it is held has the last of and soop is not and as small; it is held has the last of said soop is not plaintiff is accordingly entitled to recover. Flash Chemical Co. V. Distile States, ST O. Chi. Sool, distinguished.

Some.—Scape advertised and sold primarily for general cleaning or laundry purposes, which have only an incidental use as tollet scape, are not tarable under the Act (47 Stat. 168, 201). Sharpe & Dohme, Inc., v. Ladner, 52 Fed. (24) 733, and other cases cited.

The Reporter's statement of the case:

Mr. Ralph P. Wanlass for plaintiff. Mr. Walter G. Moyle
was on the brief.

Mr. J. H. Sheppard, with whom was Mr. Assistant Attorney General Samuel O. Clark, Jr., for the defendant. Mesers. Robert N. Anderson and Fred K. Dyar were on the brief.

The court made special findings of fact as follows:

1. During the period involved in this suit, June 1932 to
March 1933, both inclusive, plaintiff was a corporation or-

Repetity Statement of the Case
ganized and existing under and by virtue of the laws of the
State of California, with its principal place of business in
San Francisco in that state. During that period plaintiff
was engaged in the manufacture and sale of soap under the
trade name "Oneen Lilv."

2. Queen Lily soap was manufactured and sold in a white bar, approximately 4½ inches long, 2½ inches wide, and 1¾ inches thick. The bar weighed approximately 13 ounces, and contained indentations to permit convenient division into three parts. It was sold in a wrapper on which appeared the following legend:

#### WASHES WITHOUT RUBBING

H. FISCHBECK & CO., the manufacturers of the Quaza Lux Sox, are the proprietors of the first and only soap that washes without rubbing. It was introduced on this Coast in the year 1686 by the inventor. From our long experience, and with improved mater of the coast of the coast of the coast of the coast are now able to offer this brand at a greatly reduced price, and in quality and finish vastly superior to any heretofore manufactured by us.

In using all other kinds of soap, it is necessary to wash the clothes perfectly clean before boiling, or the dirt will become Ser or Bouzzo into the fabric, and cannot be washed out. In using the Queen Lily Soap it is IMPOSSIME to

BOIL the dirt in, it Bons Ir Our. The finest Liness, Cambries, and Laces washed with this Soap come from the wash sweet, pure, and uninjured. For the Toilet and Bath it has no equal—unlike most

For the Toilet and Bath it has no equal—unlike most other soaps, which leave the skin perched and dry, and liable to crack; it imparts flexibility and moisture to the skin.

It has no equal for washing flannel goods. It is excellent for washing paint work. It removes grease and pitch from fabrics. For cleaning and shampooing the head it produces wonderful effects.

Do not rub the clothes when you take them from the soaking water, put them into the boller just as they are; after they have boiled from fifteen to twenty minutes, take them from the boiler and put them into a tub; pour just sufficient cold water on them so that you can handle them, then examine them. Socks and other articles that are stained may require a little rubbing.

Reporter's Statement of the Case
In large type in two places on the label the following
words appeared:

BASY ON THE CLOTHES

EASY ON THE HANDS

3. During the period June 1982 to March 1983 plaintification file excise fax returns under Title IV of the Revenue Act of 1983 covering the sales of Queen Lily soap, adequive olicetor of Internal Revenue, pursuant to the Adoptive olicetor of Internal Revenue, pursuant to the Queen Lily soap subject to faxation under the provisions of section 693 of the Revenue Act of 1982, prepared and filed accise tax returns for the plaintiff on May 4, 1994 covering the afterwald period. The returns disclosed a tax terrets and penalties, was duly assessed in the amount of \$4,000.

4. On September 14, 1936 plaintiff filed with the Collector of Internal Revenue a claim for refund in the amount of \$1,670.86, on the ground that Queen Lily soap was not taxable as a toilet soap. The claim was rejected by the Commissioner of Internal Revenue on May 8, 1937.

5. The Federal Standard Stock Catalogue, Section IV (Part 5), being Federal Specification for floating white toilet soap for the use of the departments and independent establishments of the Government in the purchase of this commodity, contains the followine, in substance:

## B. GRADE.

B-1. White, floating soap shall be of but one grade.

## D. General Requirements.

D-1. White, floating soap shall be a cake soap, at eleast as good in every respect as one made from soda and a mixture of high-grade tallow with 25 to 30 percent of econut oil, of good light color, without objectionable odor, thoroughly saponified, and so prepared as to float on water.

## E. Detail Requirements.

E-1a. Matter volatile at 105° C. shall not exceed 34 percent. Deliveries which yield more than 34 percent volatile matter will be rejected without further test.

è	
•	Reporter's Statement of the Case
	E-1b. The sum of free alkali, total matter insoluble in alcohol, and sodium chloride shall not exceed 2.
	percent.
	E-Ic. Free alkali, calculated as sodium hydroxid

E-if. Chloride, calculated as sodium chloride (NaCl), shall not exceed 1 percent. E-ig. Matter insoluble in water shall not exceed 0.2

E-lg. Matter insoluble in water shall not exceed 0 percent.

E-1h. Rosin, sugar, and foreign matter shall not be present.
E-1i. The acid number of the mixed fatty acids prepared from the soap shall be not less than 212.

pared from the soap shall be not less than 212.

E-lk. The percentage of matter volatile at 105° C.

will be computed on the basis of the soap as received,
but all other constituents will be calculated on the basis
of material containing 28 percent of volatile matter.

6. Under date of March 7,1940 the chemist for the Bureau of Internal Revenue at Washington submitted to the Bureau, in connection with the determination of the taxability of the soap herein involved, his report of the chemical analysis of the sample of soap manufactured and submitted for the purpose by plaintiff, which is as follows:

Matter Volatile at 105° C. (Water)	23.97%
Matter insoluble in Alcohol (Sodium Carbonate)	1.54%
Sodium Chloride	0.10%
Anhydrous Scap	74.39%
Matter insoluble in Water	Trace
Acid number of mixed fatty acids	227
Free alkali	
Free acid	None

A chemical analysis of Queen Lity sosp as of September 22, 1939, made by Curtis-Tompkins, chemists employed by plaintiff in California, is as follows:

Matter Volatile at 105° C. (Water)	
Sodium Carbonate	2, 52%
Sodium Chloride	0.06%
Anhydrous Soap	67.16%
Matter insoluble in Water	
Sodium Borate	
Glycerol	6.72%

In the manufacture of this soap there was added a sufficient scent or perfume to neutralize the odor of the fats.

This scent was not discernable unless the scap was held close to the nose. The scal number of mixed futly scied indicates that a mixture of oils was used in the manufacture of the was cocount oil. The absence of free alkali indicates absence of free caustic sode, which if present would irritate the skin, both if the soap were used for toilet purposes and if it were used in washing oldehe by hand. The absence of a state of the caustic sode, which if present would irritate and the skin, both if the soap were used for toilet purposes and if it were used in washing oldehe by hand. The absence and always are used to be a state of the scale of the scale

8. Plaintiff had manufactured Queen Lily soap under substantially the same formula and used substantially the same wrapper since before 1904, and up to and including the period involved in this suit.
9. The analysis of the Bureau shows volatile matter at

23.97 percent, and the Cartin-Tompkins analysis made for plaintiff shows 21.28 percent, which is not a material difference. The analysis of the Bureau chemist shows 14.28 percent, while that of Cartis-Tompkins shows 67.16 percent of anhydrous soap, which difference may be explained by analyzing soap from different batcles, or by using a different method of arriving at the determination of the The Bureau analysis shows sodium carbonate 1.54 per-The Bureau analysis shows sodium carbonate 1.54 per-

cent, while the Curtis-Tompkins analysis shows 2.52 percent, which is an appreciable difference for that particular item. The Curtis-Tompkins analysis shows glycerol 6.72 percent, no test having been made as to this by the Bureau.

percent, no Curtus-Lompsuns analysis slows givesno .c.v.

Depercent, no test having been made as to this by the Bureau.

Used in the amounts shown in the analyses, the item of sodium carbonate would not be injurious to the skin.

Glycerol enhances the quality of the soap with respect to its effect on the skin.

The scap contains slight amounts of a derivative of benzine, turpentine, and ammonia, but in the Bureau analysis no specific test was made for gasoline, turpentine, or ammonia, except that these should have been detected in the determination of free alkali, and none were so found.

There is no ingredient shown in either analysis in amounts or percentages that would be injurious to the skin when or if used as a toilet soap. 10. Queen Lily soap was largely sold through the wholesale and retail trade grocery stores, and was held out by them as a laundry soap, and segregated with laundry soap on the shelves in their stores. It was purchased by house-

wives for a laundry soap.

Plaintiff's salesmen represented Queen Lily soap exclusively as a laundry soap, but stated that it was not harmful to the hands. In newspaper and other advertising Queen Lily soap was represented exclusively as a laundry or household soap.

11. In March 1933 plaintiff's supply of wrappers was exhausted. It had new wrappers printed, which omitted that part of the old wrapper which reads as follows:

For the Toilet and Bath it has no equal—unlike most other scaps, which leave the skin purched and dry, and liable to crack; it imparts flexibility and moisture to the skin.

The wrapper in which the soap was wrapped was printed on cheap paper similar to that used by newspapers. It had the appearance of wrappers in which other laundry soaps are wrapped, and was not at all similar to the wrappers in which toilet soaps are wrapped.

12. Plaintiff did not increase its price of Queen Lily soap at the time the Rereue Act of 1989 became effective. The tax involved herein was not included by plaintiff in the selling price of the soap, and has not been collected from plaintiff's vendees. After payment, the tax was charged on plaintiff's books to the general expense account, and subsequently charged to profit and loss.

 Under date of August 23, 1935, D. S. Bliss, Deputy Commissioner of Internal Revenue, sent a letter to counsel for taxpayer in which be said:

Reference is made to your letter dated July 20, 1925, in which you request to be advised as to whether certain language submitted by you may be used on the label of Queen Lily Laundry Soap without bringing the product within the scope of section 603 of the Revenue Act of 1932.

The statement you wish to use is as follows:
"Queen Lily is all soap—contains no alkali or harmful
fillers, which are so injurious to the skin. Queen Lily

is easy on the hands, being absolutely pure, lasts longer, does not require rubbing and can be safely used on the most delicate fabrics and fine woolens. Not only will your clothes last longer when you use Queen Lily but notice with what a minimum of effort you have completed your dishwashing and handering without any injurious effect on your hands."

It is held that Queen Lily Laundry Soap when sold under a label containing the above reading matter will not be subject to the tax imposed by section 603 of the Revenue Act of 1932.

The formula used in the manufacture of Queen Lily soap at this time was practically the same as during the period here involved.

14. The percentages or quantities of the ingredients as shown in the analyses cause Queen Lily soap to come within the requirements for toilet soap as set forth in Federal specifications for toilet soap.

The court decided that the plaintiff was entitled to recover.

WHYPANER, Judgs. delivered the opinion of the court:

The question presented is whether or not the plaintiff's soap, called "Queen Lily," is a toilet soap and is used or applied or intended to be used or applied for toilet purposes and, therefore, taxable under section 603 of the Revenue Act of 1932 (47 Stat. 169, 261), which reads as follows:

2 (47 Stat. 169, 261), which reads as follows

Sec. 603. Tax on toilet preparations, etc .-There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, tooth and mouth washes (except that the rate shall be 5 per centum), dentifrices (except that the rate shall be 5 per centum), tooth pastes (except that the rate shall be 5 per centum), aromatic cachous, toilet soaps (except that the rate shall be 5 per centum), toilet powders, and any similar substance, article, or preparation, by whatsoever name known or distinguished; any of the above which are used or applied or intended to be used or applied for toilet purposes.

Onlnien of the Court We are satisfied from the proof that it might be used for toilet purposes, but we are also satisfied that its predominant use is as a laundry soap. Its use for toilet purposes is rare. The manufacturers of it intended it for use as a laundry soap only. The testimony shows that it was never advertised as anything but a laundry soap, and the plaintiff's salesmen never sold it for anything other than laundry soap. Neither in the advertising in the newspapers. nor by window displays, nor in the sales talks of the salesmen was it ever held out as useful for toilet purposes, but only for laundry and household purposes. It was sold to wholesale grocers, who bought it as a laundry soap, and they sold it to their retail customers as a laundry soap. It was carried on their shelves with other laundry soaps and never with toilet soaps. Consumers purchased it for laundry or household uses.

The above is testified to by plaintiffs employees, the manager, the sales manager, and salesmen, and also by wholesale grocers who purchased it, and by plaintiffs advertising man, and by a representative of a newspape which carried the advertising. The sole evidence to the contrary is the recitation on the wrapper in which the soap was wranced, which reads as follows:

For the Toilet and Bath it has no equal—unlike most other soaps, which leave the skin parched and dry, and liable to crack; it imparts flexibility and moisture to the skin.

An examination of this wrapper, however, discloses that this was thrown in incidentally as still another use which might be made of the soap. The chief claim made in the wrapper was that it was good for washing clothes. The directions for its use were confined exclusively to its use in washing clothes.

The wrapper itself is not such a wrapper as would be used on a toilet soap. It was made of puper of the grade used by newspapers and presented the appearance of wrappers on other laundry soaps. It is a cheap wrapper; it looks nothing like the wrappers around toilet soaps. The proof shows that this company started manifecturing this soap in the 1800%, and that they have used practically the same wrapdepth = 1.0 - 1.0 M pc. = 30.

Restrict Statement of the Case
per ever since. Whether or not it was held out as a toilet
soap many years ago, we are satisfied that it was not so
held out during the period in question. The recitation in
the wrapper that it was a good toilet soap was merely a
survival of a claim made many years back.

It is well settled by both article 22 of Regulations 46 and court decisions that soaps advertised and sold primarily for general cleaning or laundry purposes, and which have only an incidental use as a toilet soap, are not taxable under the Act. \*\*Sharpe & Dohme, \*\*Inc., \*\*Ladner, 82.\*\* (24) 783, \*\*Menthholatum Co. \*\*Motter, '11 F. (24) 1013; \*\*Takara Laboratories \*\*Linida States, 100 F. (24) 1022.

We are satisfied that this soap was not held out for use as a toilet soap during the period in question, notwithstanding the above-quoted recitation on the wrapper in which the soap was wrapped.

In March 1933 the plaintiff's supply of wrappers containing this recitation had been exhausted and new wrappers were printed which omitted this recitation. Since that time the Commissioner of Internal Revenue has asserted against it no tax under this section.

We hold that the sale of this soan is not taxable under the

quoted provision of the Revenue Act, and that plaintiff, therefore, is entitled to the refund sought.

This is not inconsistent with our holding in Flash Chemical

Co. v. United States, 87 C. Ch. 230. Finding 7 in that case shows that this soap was advertised equally as a neap for the hands as for household use. The opinion states that 75 epecent of its use was for cleaning hands, and only 25 percent for general household use. The opinion expressly stated that its use for tollet purposes was not merely incidental, in the present case the testimony shows that this scap was not held out as a tollet soap during the period in question and that its use for this purpose was only occasional and incidental.

Judgment will be entered against the defendant in favor of plaintiff in the sum of \$1,667.14, with interest as provided by law. It is so ordered.

Madden, Judge; Jones, Judge; Lettleton, Judge; and Wealer, Chief Justice, concur. 591

Onlinian of the Court

EDMOND L. VILES v. THE UNITED STATES [No. 45416. Decided January 5, 1942. Plaintiff's motion for

new trial overruled April 6, 19421 On Defendant's Plea to the Jurisdiction

Relief to persons erroneously convicted in Federal courts.-The Act of May 24, 1938, an act to grant relief to persons erroneously convicted in the Federal courts, applies only to acquittals or pardons after the passage of the act.

Some.-In the instant case, it is held that the pardon does not contain the recitals called for by the Act of May 24, 1938.

Mr. Edmond L. Viles pro se.

Mr. Robert E. Mitchell, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant,

The facts sufficiently appear from the opinion of the court.

WHITAKER, Judge, delivered the opinion of the court: This case is before us on what the defendant calls its pleato the jurisdiction. The paper filed is not a plea, but is in all essential respects a motion to dismiss for lack of jurisdiction, and it will be so treated.

It is grounded, first, on the fact that the petition, with the annexed exhibits, shows on its face that the pardon was granted prior to the passage of the Act of May 24, 1938 (52 Stat. 438), and that this Act applies only to acquittals or pardons after the passage of the Act. The case is brought under the terms of this Act of May 24, 1938 for the relief therein granted, and that Act plainly has application only to such pardons as are granted after its passage. The first section of the Act reads:

That any person who, having been convicted of any crime or offense against the United States and having been sentenced to imprisonment and having served all or any part of his sentence, shall hereafter, on appeal or on a new trial or rehearing, be found not guilty of the crime of which he was convicted or shall hereafter receive a pardon on the ground of innocence. \* may, subject to the limitations and conditions hereinafter stated, and in accordance with the provisions of the Judicial Code, maintain suit against the United States in the Court of Claims for damages sustained by him as a result of such conviction and imprisonment. [Italics ours.]

The plaintiff, therefore, is plainly not entitled to the relief granted by the statute, inasmuch as the pardon shows on its face that it was granted on March 2, 1933, and the Act was passed on May 24, 1938.

Second, defendant also defends on the ground that the pardon does not contain the recitals called for by this Act of May 24, 1938. This defense is also good. See Martin Prisament v. United States, 92 C. Cls. 434.

Defendant's motion to dismiss is sustained, and plaintiff's petition is dismissed. It is so ordered.

Madden, Judge; Jones, Judge; Leytleton, Judge; and Whaley, Chief Justice, concur.

THE STOLLY TRIBE OF INDIANS CONSISTING OF THE SIOUX TRIBE OF THE ROSEBUD INDIAN RESERVATION IN THE STATE OF SOUTH DA. KOTA: THE SIGHY TRIBE OF THE STANDING ROCK INDIAN RESERVATION IN THE STATES OF NORTH DAKOTA AND SOUTH DAKOTA THE SIGHX TRIBE OF THE PINE RIDGE IN. DIAN RESERVATION IN THE STATE OF SOUTH DAKOTA: THE SIGUY TRIBE OF THE CHEY. ENNE RIVER INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA: THE SIGUX TRIBE OF THE CROW CREEK INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA: THE SIOUX TRIBE OF THE LOWER BRULE RESER. VATION IN THE STATE OF SOUTH DAKOTA: THE SIOUX TRIBE OF THE SANTEE INDIAN RESERVATION IN THE STATE OF NEBRASKA: 592 Reporter's Statement of the Case

AND THE SIOUX TRIBE OF THE FORT PECK INDIAN RESERVATION IN THE STATE OF MONTANA v. THE UNITED STATES

Sale of Santee Lands, Minnesota, 1861

[No. C-531 (15). Decided March 2, 1942]
On the Proofs

## Indian ctains; claims canceled and forfeiled under the Act of Pebru-

ary 15, 1885.—It is hold that under the provisions of the Act of February 16, 1886, all the claims of the plaintiff bands of Indians against the detendant are canceled and forfeited, and plaintiffs are not estitled to recover in the instant case. The Reporter's statement of the case.

Mr. Ralph H. Case for the plaintiffs. Messrs. James S. Y. Ivins and Richard B. Barker were on the brief. Mr. Raymond T. Nagle, with whom was Mr. Assistant

mr. n.symond T. Nagle, with whom was Mr. Assistant Attorney General Norman M. Littell, for the defendant. Mr. George T. Stormont was on the brief.

The court made special findings of fact as follows:

 By an Act of Congress approved June 3, 1920 (41 Stat. 738), it was provided:

That all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon,

SEC. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal

95 C. Cla Reporter's Statement of the Case and equitable, of each and all the parties thereto, notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel. but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums heretofore paid or expended for the benefit of said tribe or any band thereof. The claim or claims of the tribe or band or bands thereof may be presented separately or jointly by petition, subject, however, to amendment, suit to be filed within five years after the passage of this Act; and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant, and any band or bands of said tribe or any other tribe or hand of Indians the court may deem necessary to a final determination of such suit or suits may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys employed by said Sioux Tribe or any bands thereof, shall set forth all the facts on which the claims for recovery are based, and said petition shall be signed by the attorney or attorneys employed and no other verification shall be necessary. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said tribe or bands thereof

to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for the said tribe or hands of Indians. SEC. 3. That upon the final determination of such suit, cause, or action, the Court of Claims shall decree such fees as it shall find reasonable to be paid the attorney or attorneys employed therein by said tribe or bands of Indians under contracts negotiated and approved as provided by existing law, and in no case shall the fee decreed by said Court of Claims be in excess of the amounts stipulated in the contracts approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and no attorney shall have a right to represent the said tribes or any band thereof in any suit, cause, or action under the provisions of this Act until his contract shall have been approved as herein provided. The fees decreed by the court to the attorney or attorneys of record shall be paid out of any sum or sums recovered in such suits or actions, and no part of such fees shall be taken from any money in the Treasury of the United States belonging to such tribe or bands of Indians in whose behalf the suit is brought unless specifically authorized in the contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior as herein provided: Provided, That in no case shall the fees decreed by said court amount to more than 10 per centum of the amount of the judgment recovered in such cause.

The plaintiffs are the Santee Tribe or Band of Sioux Indians of the Santee Indian Reservation in the State of Nebraska.

3. On June 19, 1858, a treaty was concluded between the United States and the Mendawakanton and Wahpakoota bands of the Dakota or Sioux Indians, now known as the Santee Sioux Indians. This treaty was ratified on March 9, 1859, and proclaimed on March 31, 1859 (12 Stat 103).

The pertinent articles of this treaty are as follows:

ARTICLE III. It is also agreed that if the Senate shall authorize the land designated in article two of this agreement to be sold for the benefit of the said Mendawakanton and Wahpakoota bands, or shall prescribe an amount to be paid said bands for their interest in said tract, provision shall be made by which the chiefs and headmen of said bands may, in their discretion, in open council authorize to be paid out of the proceeds of said tract, such sum or sums as may be found necessary and proper, not exceeding seventy thousand dollars, to satisfy their just debts and obligations, and to provide goods to be taken by said chiefs and headmen to the said bands upon their return: Provided, however, That their said determinations shall be approved by the superintendent of Indian affairs for the northern superintendency for the time being, and the said payments be authorized by the Secretary of the Interior.

ARTICLE VIII. Such of the stipulations of former treaties as provided for the payment of particular sums bands, or for the application or expenditure of specific amounts for particular objects or purposes, shall be, and hereby are, so amended and changed as to invest the Secretary of the Interior with discretionary power the Secretary of all such sums or amounts which have

95 C. Chr. Reporter's Statement of the Case accrued and are now due to said bands, together with the amount the said bands shall become annually entitled to under and by virtue of the provisions of this agreement: Provided. The said sums or amounts shall be expended for the benefit of said bands at such time or times and in such manner as the said Secretary shall deem best calculated to promote their interests, welfare, and advance in civilization. And it is further agreed, that such change may be made in the stipulations of former treaties which provide for the payment of particular sums for specified purposes, as to permit the chiefs and braves of said bands or any of the subdivisions of said bands, with the sanction of the Secretary of the Interior, to authorize such payment or expenditures of their annuities, or any portion thereof, which are to become due hereafter, as may be deemed best for the general interests and welfare of the said bands or subdivisions thereof.

By resolution of June 27, 1860 (12 Stat. 1042), in accordance with Article II of the Treaty, the Senate determined that the plaintiff bands possessed a just and valid right to the lands referred to hereinafter in finding 5 and that they be allowed thirty cents per acre therefor.

4. The "just debts and obligations" referred to in Article III of the treaty were amounts due to licensed traders for supplies theretofore furnished the members of the hands on credit. At the time the treaty was negotiated the total amount of these debts was not known, but the chiefe and headmen of the bands estimated that the sum of \$70,000 would be sufficient to liquidate them, and that amount was accordingly fixed in the treaty as the amount which could be used for this purpose.

Under instructions from the office of Indian Affairs the superintendent of Indian Affairs for the Northern Superintendency (Cullen) in November, 1860, submitted the matter, in accordance with Article III of the treaty, to the chiefs and headmen for action. On December 3, 1860, the chiefs and headmen notified the superintendent of their determination, which was to the effect that the superintendent make a full examination of all claims presented against them up to the date of the council held by them and that. should \$70,000 not be sufficient to pay all claims found to be due, the surplus be used to pay the amount of the claims over \$70,000, the purpose of this request being that the might feel that all their past engagements had been liquidated. Upon receiving this request from the Indians, the traders who had given credit to the Indians since the date of the treaty presented their books and accounts against the Indians unto the date of the council.

Indians up to the date of the council.
Under date of February 13, 1881, Superintendent Cullen
advised the Commissioner of Indian Affairs of the result
of the council and recommended that the request of the
Indians that the balance of the amount referred to
Indians that the balance of the amount referred to
of the result of the result of the result of the result
of their debts, be granted, stating that "should any allowance be made, it is only under the discretionary clause of
the treat's at the coses now stant.

Superintendent Cullen had also been instructed to make a careful examination of the debts of the Indians and submit them, with the result of his investigation, to the Indian Office. This was done, and the claims were thereupon thoroughly examined in the Indian Office; and there was found to land the form the Indians.

For payment to the Medi-a-wa-kan-ton and Wahpa-koo-ta bands of the Dakota or Sloux Indians, for their reservation on the Minnesota river in the state of Minnesota containing three hundred and twenty thousand acres, at thirty cents per acre, ninety-six thousand collurs: Provided, That the said sum may be paid, at different collumniation of the magnetic properties of the United States authorized by law, at the present session of Congress.

6. Following the examination of these accounts in the Indian Office, as shown in Finding 4, the matter was submitted to the Secretary of the Interior for his action as required by the treaty. On May 31, 1861, the Secretary instructed

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the Commissioner of Indian Affairs to pay to such claimants
as may be willing to accept the same in full satisfaction,
their pro rata share of the fund specified in the treaty.

Under this authorization, there was paid to the creditors of the plaintiff bands, who accepted payment under protest, in the fiscal years 1861 and 1862 upon their audited accounts the total sum of \$69,165.07.

The request of the plaintiff bands that its debts incurred subsequent to the treaty and prior to the date of the council in 1880 also be paid was submitted to the Secretary of the Interior on August 8, 1881, and the Secretary by letter dated August 27, 1891, directed the payment of these debts. Thereupon these debts, amounting to \$34,150.47, were paid for ratio to the extent of \$82,054.28 in the fiscal year 1882.

In the fiscal year 1863 there was paid out of this appropriation of \$96,000, on account of obligations incurred by the plaintiff bands during the period of their removal from the State of Minnesota, the sum of \$80,000 in the act of March 2, 1861, and left a balance of \$96,000 in the act of March 2, 1861, and left a balance of approximately \$42,000 unpaid upon the claims sudited in 1860.

7. In a letter dated June 13, 1870, addressed to the Speaker of the House of Representatives, the Secretary of the Interior stated among other things that it had been ascertained by the Infalian Department that after the payment of the of the Infalian six the date of the treaties, a balance of the Infalians at the date of the treaties, a balance of \$75,016.32 remained against them and that there was also due by the Lower bands of Sicotz Infalians the sum of the Infalians of the Infalians of Sicotz Infalians the sum of the Infalians of the Infalians of Sicotz Infalians the sum of the Infalians of Sicotz Infalians are summer to the Infalians of Sicotz Infalians and the Infalians of Sicotz Infalians the sum of the Infalians of Sicotz Infalians the Sicotz Infalians of Sicotz Infalians and Infalians of Sicotz Infalians and Infalians of Sicotz Infalians and Infalians of Sicotz Infalians of Sicotz

He also stated that he was satisfied the claims were probably just and should be paid but that the department had no funds for that purpose and suggested that Congress make an appropriation out of \$65,819.47 for the payment thereof. Subsequently, a bill (H. R. 420), appropriating an additional sum of \$70,000 for this purpose was introduced in

tional sum of \$70,000 for this purpose was introduced in the House of Representatives accompanied by a report which recited the steps taken by the Secretary of the InReporter's Statement of the Case tarior and Commissioner of Indians Affairs in disbursing the appropriation of \$96,000 carried in the act of March 2, 1861.

With full knowledge of the manner of the disburssems of the 880,000, Congress passed a bill which beames the act of May 16, 1874, which provided for the payment by the States to the excellence of the Upper and Lower Bands of Sloux Indiana, arising under the treaty of June ninestend, eighteen hundred and fifty-eight, between said bands and the United States" and appropriating \$70,000 or so much as may be necessary to carry the provisions of the bill sen my be necessary to carry the provisions of the bill

Out of this appropriation of \$70,000, there was paid on behalf of the plaintiff bands the following amounts:

Payment to creditors of balance due for obligations incurred prior to treaty of June

19, 1858	\$33, 640, 81
Payment to creditors of balance due for ob-	
ligations incurred subsequent to treaty of	
June 19, 1858, and prior to date of council	
held by Superintendent Cullen, Northern	
Superintendency, December 3, 1880	8, 196, 12
Clerical services in connection with settlement	
of creditors' claims.	250, 00

Total... 42,080.83

8. The defendant has not paid the plaintiffs anything out of the \$96,000 originally appropriated in payment for their lands, or the \$70,000 which the United States was authorized

to pay to the creditors of the plaintiffs in compromise and settlement of their claims.

9. Under authority of the act of Congress of June 3, 1920, sweep, the plaintiffs, which constitute the Sioux tribe named

9. Under authority of the act of congress of June 3, 1920, superport, the plaintiffs, which constitute the Sious trile named therein, through their duly authorized attorneys, filed their petition in this Court on May 7, 1923, alleging among other things a right of recovery for and on behalf of the Santes and of Sioux Indians of the Santee Indian Reservation in the State of Nebraska, upon the cause of sction now before the Court. On June 11, 1934, with leave of the

Opinion of the Court

Court, a separate amended petition, alleging solely the
present cause of action, was filed.

10. By the act of February 16, 1863 (12 Stat. 652), Congress declared, in part, as follows:

Whereas the United States heretofore became bound by treaty stipulations to the Sisseton, Wahpaton, Medawakanton, and Wathlnakonta hands of the Dakota or Sioux Indians to pay large sums of money and annuities, the greater portion of which remains unpaid according to the terms of said treaty stimulations; and whereas during the past year the aforesaid bands of Indians made an unprovoked, aggressive, and most savage war upon the United States, and massacred a large number of men, women, and children within the State of Minnesota, and destroyed and damaged a large amount of property, and thereby have forfeited all just claim to the said moneys and annuities to the United States; and whereas it is just and equitable that the persons whose property has been destroyed or damaged by the said Indians, or destroyed or damaged by the troops of the United States in said war, should be indemnified in whole or in part out of the indebtedness and annuities so forfeited as aforesaid: Therefore-

Be it moeted by the Sendse and House of Representatives of the United States of America in Compress assembled, That all treatine hereforce made and enand Walpaccook bands of Sious to Dakota Indias, or any of them, with the United States, are hereby declared to be abroyated and annulled, or far as said called to the control of the Compression of the Compression on the United States, and all lands and rights of occupancy within the State of Minmesots, and all annuities and claims herefore accorded to anid Indians, or any of them, to be forfeited to the United States.

The court decided that the plaintiffs were not entitled to recover.

Green, Judge, delivered the opinion of the court:

This case is begun under an Act of Congress set out in finding 1 giving the Sioux Tribe of Indians the right to submit any claims which it may have against the United Opinion of the Court

States to this court notwithstanding the lapse of time or statutes of limitation, and providing that the claim or claims of the tribes or bands thereof may be presented separately or jointly by a petition.

The plaintiffs are the Santee Tribe and are a band of the Sioux Indians of the Santee Reservation in the State of Nebraska.

The Treaty of June 19, 1885, between the United States and the Santes Indians, provided among other things that if the Senate should authorize certain linds to be sold for Senate should authorize certain linds to be sold for prescribe the amount to be paid and bands for their interest in said tract, provisions shall be made by which the chiefe and headmen of said bands may in their discretion, in open council, authorize to be paid out of the proceede of said to consider the said to the proceeded of said the said to the proceeded of said to the proceeding stronger to entirely their june dube and obligations.

By the Act of March 2, 1881, Congress appropriated the sum of \$80,000 in payment for \$20,000 ocree of land in the State of Minnesota belonging to the Santes bands of Sioux Indians at the rate of 30 cents per acre and provided that this sum might be paid at the discretion of the Secretary of the Treasury in bonds of the United State.

The defendant has never paid or in any way accounted for the difference between the sum of \$96,000 appropriated

for the difference between the sum of \$95,000 appropriated in payment for the Indian lands and the \$70,000 which the United States was authorized to pay the creditors of the plaintiffs. Plaintiffs now ask judgment for \$85,000 together with interest thereon by reason of the failure of the defendant to make this payment.

telemental to index superpotential to this claim. The first is that its blaim of \$80,000 and more was paid to the creditors of the Indians in accordance with their request as shown by findings 4 and 6 and, as the use of this blaims for the purpose shown was at the request of the plaintial bands, the defendant argues that plaintiffs are thereby setopped to question its validity and that even if the use of the blaims indicated had been improper, it was gube-

Ontains of the Court quently ratified and confirmed by the Act of May 16, 1874, as shown by finding 7.

Plaintiffs contend that under the provisions of Article 3 of the Treaty of 1858 not more than \$70,000 could be paid out of their fund upon their debts to the traders and that, when and if that \$70,000 was used up, the residue of \$26,000 of the appropriation of \$96,000 in 1861 (12 Stat. 221, 237). in payment for certain land, belonged to the plaintiffs and could not be used by the Secretary of the Interior to pay any debts of the plaintiff bands. We do not find it neces-

sary to discuss or decide this question. By the Act of February 16, 1863, Congress declared that the plaintiff bands of Indians and other bands of the Dakota or Sioux Indians had "during the past year \* \* \* made an unprovoked, appressive, and most savage war upon the United States and massacred a large number of men, women, and children within the State of Minnesota and destroyed and damaged a large amount of property" and thereby forfeited all just claim to any money unpaid them; also, that all treaties purported to impose any further obligation on the United States and all lands and rights of occupancy within the State of Minnesota "are hereby declared to be abrogated and annulled," so far as they purport to impose any future obligation on the United States, and all lands and rights of occupancy within the State of Minnesota, and all annuities and claims heretofore accorded to said Indians, or any of them, to be forfeited to the United States. See finding 10

It is quite clear that by the statute referred to above, all claims of the plaintiffs are cancelled and forfeited.

for the statute in full.

Judgment must, therefore, be entered dismissing plaintiffs' petition and it is so ordered.

Madden, Judge; Jones, Judge; Whitaker, Judge; and Lerrizon, Judge, concur.

THE STOUX TRIBE OF INDIANS, CONSISTING OF THE SIGUX TRIBE OF THE ROSEBUD INDIAN RESERVATION IN THE STATE OF SOUTH DA-KOTA: THE SIGHT TRIBE OF THE STANDING ROCK INDIAN RESERVATION IN THE STATES OF NORTH DAKOTA AND SOUTH DAKOTA: THE SIQUY TRIBE OF THE PINE RIDGE INDIAN RESERVATION IN THE STATE OF SOUTH DA-KOTA · THE SIGHY TRIBE OF THE CHEVENNE RIVER INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA - THE SIQUY TRIBE OF THE CROW CREEK INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA: THE SIGHX TRIBE OF THE LOWER BRULE RESERVATION IN THE STATE OF SOUTH DAKOTA: THE SIGHX TRIBE OF THE SANTEE INDIAN RESERVATION IN THE STATE OF NEBRASKA: AND THE SIQUE TRIBE OF THE FORT PECK INDIAN RESERVA-TION IN THE STATE OF MONTANA v. THE UNITED STATES OF AMERICA

> Sale of Santee Lands, Minnesota, 1863 [No. C-531 (16). Decided March 2, 1942]

On the Proofs

Indian claims: distribution of proceeds from sale of lands under the Act of July 15, 1870, a discharge in full.-It is held that the distribution to the Medawskaston and Webnekoota Bands of Indians of proceeds from the sale of reservation lands of the Sinux Tribe, upon the basis of determination by the Secretary of the Interior with respect to the population of the respective bands under the provisions of the Act of July 15, 1870, was a discharge in full of defendant's obligation to plaintiffs under the Acts of March 3, 1863, and July 15, 1870; and plaintiffs

accordingly are not entitled to recover. Same; res judicata.-The decision of the Court of Claims in the case of Medawakanion and Wahpakoota Bands of Sioux Indians v. The United States, 57 C. Cls. 357, in which the court did not undertake to make a division of the funds there involved according to the precise number of people in each hand, as required in the instant case under the provisions of the Act of July 15, 1870, is not res judicute of the issues.

in the instant case.

The Reporter's statement of the case:

Mr. Ralph H. Case for the plaintiff. Mesers. J. S. Y. Ivins and Richard B. Barker were on the briefs.

Mr. George T. Stormont, with whom was Mr. Assistant Attorney General Norman M. Littell, for the defendant. Mr. Raymond T. Nagle was on the brief.

## The court made special findings of fact as follows:

1. This suit is brought by the Sioux Tribe of Indians for the use and benefit of the Medawakanton and Wahpakoota bands, which are hands of the Siony Tribe of the Santee Indian Reservation of the State of Nebraska. Previously a suit had been brought on May 7, 1923, under the authority of the Act of June 3, 1920 (41 Stat. 738). on behalf of the Sioux Tribe of Indians, including, among other bands, the Sioux Tribe of the Santee Indian Reservation in the State of Nebraska. The petition was designated on the records of the court as C-531. On February 26, 1934 this court entered an order allowing the several bands of the Sioux Tribe of Indians to file separate amended petitions in case No. C-531, and pursuant thereto the present petition was filed on June 11, 1934.

2. The Medawakanton and Wahpakoota bands, together with the Sisseton and Wahpeton bands, were known as the Minnesota or Mississippi Sioux.

3. In August of 1862 there was an outbreak of Sionx Indians in Minnesota, consisting of the four bands above named. during which a large number of white settlers were massacred and a great amount of property destroyed. In consequence of this outbreak Congress by the Act of February 16, 1863 (12 Stat. 652), abrogated and annulled all treaties between said bands of Indians and the United States, so far as said treaties purported to impose any future obligation on the United States, and declared all lands and rights of occupancy accorded to said Indians within the State of Minnesota to be forfeited to the United States. The Act further provided for the payment of damages suffered by citizens in said outbreak out of the funds in the hands of the Government belonging to said bands.

However, shortly thereafter, to wit, on March 3, 1863 (12 Stat. 519), Congress passed an act providing for the removal of these bands from the reservations they were then occupying, and for the sale of the lands included in these reservations, and for the use of the money realized therefrom for the benefit of the Indian so of these bands of these bands.

The sale began in 1865 and continued over a long period of time. The total proceeds derived therefrom amounted to \$850.063.71.

4. By Act of July 15, 1870 (16 Stat. 335, 361), the Act of March 3, 1863 (12 Stat. 819), was amended in part as follows:

Sec. [7] And be it further enacted, That the act approved March three, eighteen fundered and sixty-diree, entitled "An act for the removal of the Sisseton, entitled "An act for the removal of the Sisseton Sisseton Dakoton Indiana, and for the elipsoition of their lands in Minnesota and Dakota" be so amended as to make a proceeds of the sale of the reservations in said act to prove the sale of the reservations in said act upon which Mediawakanton and Wahpakotos and Sisseton and Wahpaton have been or may hereafter be located.

Suo. [8.] And be it further enacted, That said proceeds shall be distributed and paid equitably to the said Indians in proportion to their numbers, under the direction of the Secretary of the Interior, and in accordance with existing laws: Provided, That this provision shall apply only to the funds to be hereafter distributed.

5. Pursuant to the requirements of the Act of July 15, 1870 (16 Stat. 335, 361), the Secretary of the Interior made distribution of their portion of the proceeds from the sale of said lands to the Medawakanton and Wahpakoota Bands of Indians, upon the basis of determinations by the Secretary with respect to the population of the respective bands.

According to said determinations, from July 15, 1870 to June 30, 1871 the total population of the four bands was 8,012, of which total the plaintiff bands composed 974; from July 1, 1871 to June 30, 1872 the total population of the four bands was 3,145, of which total the plaintiff bands composed 987; and from July 1, 1872 to June 30, 1997 the plaintiff bands composed two-sevenths of the total population of the four bands.

From the aggregate of \$950,063.71, proceeds of the sale of said lands, \$227,850.83 was disbursed for the benefit of the plaintiff bands of Sioux Indians.

plaintiff bands of Sioux Indians.

6. The defendant has fully discharged its obligation to plaintiffs under the acts of March 3, 1863 and July 15, 1870.

The court decided that the plaintiffs were not entitled to recover.

WHITAKER, Judge, delivered the opinion of the court:
This is a suit to recover what plaintiffs claim is their
proportionate part of the proceeds of the sale of certain
lands in Minnesota. The defendant has paid to them what
it thinks is their proper proportion, but plaintiffs say they
are entitled to a larger proportion than has been paid

them.

The act of July 15, 1870, which amends the act of March
3, 1883 providing for the sale of these lands, specified that
the proceeds of the sale "shall be distributed and paid
equitably to the said Indians in proportion to their
numbers \* • \* n"

Of the total of \$800,003.11 realized from the sale of the lands, the sum of \$807,800.85 here paid to plaintiffs, which is a little more than 34 percent. The bands suitled to share in these proceeds were the plaintiffs (the Medawakanton and Wahpshoota bands) and the Sisseston Lided to the sum of the sum of the sum of the sum of the Indian Affairs show that the plaintiff hands comprise about 33 percent of the total population of the four bands. In 1970 they comprise 350 percent of the total population; in 1971, 314 percent; in 1879 something over 30 percent, in 1971, 314 percent; in 1879 something over 30 percent.

proportion of the proceeds of the sale of these lands.

The plaintiffs, however, say that we are foreclosed from inquiring as to what is the proper proportion by reason of our decision in the case of \*Medawakanton and Wahpakoota Bands of Sious Indians v. The United States, 57 C. Cla. 387.

There is no basis for this contention. The decision in that

trainian of the Court case is not res indicata here because the issue between the parties was not the same as the issue here. That suit was brought to recover the amount of certain annuities which had been forfeited previously. From the amount of annuities found to be due, the court was directed to set off any amount paid these four hands of Indians subsequent to abrogation of the treaties with them. Some of the items to be offset consisted of amounts paid to compensate for depredations committed by these four bands of Indians, payments of their debts to traders, payments to members of their tribe who had served in the forces of defendant as scouts and soldiers, and also payment for their support. The court took one-half of the total sum spent for the above purposes for the benefit of the four bands, and offset this amount against the amount due plaintiff bands for annuities.

The plaintiffs say that this was a determination that the plaintiff hands were entitled to one-half of whatever amount was payable to the four bands. This does not follow. The Act here in question expressly directed that the proceeds of the sale of these lands be distributed among the Indians according to population. The court in the case reported in 57 C. Cls. 357, was not proceeding under this statute or a similar one. So far as is known, there was no proof before the court in that case as to the population of the several bands, nor was this proof necessarily essential in order to determine the proportion of the apprepate payments to be charged against each band on account of most of the items mentioned above. Although the Sisseton and Wahpeton bands may have been more populous than the plaintiff bands, still, the plaintiffs may have committed more depredations, and plaintiffs may have been more heavily indebted to traders, and more of plaintiffs' members might have been scouts and soldiers. The only item that has relation to population is the payments for support of the bands. No doubt, the greater the population of the different bands the more was spent for their support. But it is evident from a reading of the opinion in that case that the court did not undertake to make a division according to the precise number of people in each band. It adopted the rough rule, under all the circumstances of that case, of charging one-half to the plaintiff bands and one-half to the Sisseton and Wahpeton bands. Certainly, that did not amount to a determination of what was a proper division under an act requiring the division to be made "in proportion to their numbers."

It would appear that the plaintiffs have been paid their due proportion of the proceeds of the sale of the lands in question and, therefore, they are not entitled to recover. Their petition will be dismissed. It is so ordered.

MADDEN, Judge; JONES, Judge; LATTLETON, Judge; and WHALEY, Chief Justice, concur.

## HAZEN C. PRATT v. THE UNITED STATES

[No. H-328. Decided March 2, 1942]

On the Proofs

Patente; validity; infringement.—United States letters patent No. 1483472, for "Airplane Landling Mechanism," held invalid and not infringed by the United States.

Sasse; anticipation.—Claims 1, 15, and 16 of the Pratt patent in suit filled July 14, 1922, are readable upon the disclosure of the British patent to Whiteway, No. 132002, filed October 4, 1918.
Same.—The disclosures of claims 2, 3, and 9 of the Pratt patent in

Same.—The disclosures of claims 2, 3, and 9 of the Pratt patent in sult are a combination of Le Mesurier's arm and hook (U. S. No. 131559), filed June 10, 1919) with Whiteway's point of attachment and do not amount to invention.

Sasec.—Claims 12, 13, and 14 of the Pratt patent in suit, involving the use of a universal connection between the plane and the rod, are anticipated by the Whiteway and Le Mesurier patents. Sasec.—The proof shows that the supposed merit of plaintiffs inven-

tion, which was the slowing down of a plane while it was still in the air, in order to land it, has not been well regarded by the defendant and plaintiff has not shown that it has been aboved by others.

motored by others.
Same.—The momoply of a patent does not cover another device, constructed in good faith to operate upon a principle different from that involved in and intended by the patent, merely because it is impossible or impracticable to construct the other device so that it can be operated without inadvertently or unskillfully, upon occusion, infringing upon the outside beandaries of what might seem iterally to be within the patent.

600

Same .- In the instant case it would not be a proper application of the purpose of the patent laws to construc plaintiff's assumed patent for a device to retard the speed of a plane while still in flight so broadly as to prevent the development and use by others of a device to stop the roll of a plane after it has touched the landing surface.

Same.-It is held that all of plaintiff's claims are invalid as having been anticipated.

Same .- It is held that plaintiff's claim to a device attached in the year of the center of gravity and so disposed as to exert a retarding force in approximate fore and oft horizontal alinement with the center of gravity of the plane, in order to retard the speed of the plane while still in flight, was not infringed by the defendant

The Reporter's statement of the case:

## Mr. Edward H. Cumpston for the plaintiff.

Mr. Samuel E. Darby, Jr., with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant. Mr. Paul P. Stoughtenburgh was on the brief. In this case the court on February 8, 1937, rendered an

opinion holding United States letters patent, No. 1499479 to be valid and infringed by the Government; and upon defendant's motion for new trial said motion was overruled July 6, 1937, and the opinion theretofore rendered was amended: interlocutory judgment was rendered October 4. 1937 (85 C. Cls. 1).

Defendant's petition for writ of certiorari was denied by the Supreme Court November 22, 1937 (202 U. S. 750; 85 C. Cls. 711).

On July 1, 1939, there was filed motion of defendant for leave to file motion for new trial under Section 175 of the Judicial Code, which motion was granted and said motion for new trial, filed November 15, 1939, was granted December 4, 1939, and an order entered suspending the accounting proceedings and referring the case to a commissioner of the court, with leave to defendant to present evidence regarding the patents, publications, and uses specifically listed in said motion and directed to the effect of same on claims 1, 2, 3, 9, 12, 13, 14, 15, and 16 previously held by the court to be valid and infringed; and defendant was also authorized to

present additional evidence as to the method or methods of landing, and apparatus employed by the United States for the purpose, within a period of six years prior to the filing of the petition in this case; and plaintiff was authorized to present evidence in rebuttal.

Upon the report of the commissioner and reargument of the case, decision was rendered March 2, 1942, vacating the previous findings of fact, conclusion of law, and opinion.

The court, on March 2, 1942, made special findings of fact as follows:

I. This suit is brought by Hazen C. Pratt, a citizen of the United States and a resident of Rochester, New York, for alleged infringement of United States letters-patent to him, No. 1899472 for "Airplane Landing Mechanism", patented July 1, 1924, on an application filed July 14, 1922. A certified copy of the Patent Office file wrapper and contents of the patent in suit is in evidence as plaintiff's exhibit F and is made a nast of these findings by reference.

2. Plaintiff at the time of filing his petition herein was the owner of the entire right, title, and interest in and to the patent in suit and to all rights of recovery thereunder.
3. The simplane was recomized at a date early in its de-

velopment as a useful military weapon and by 1917 the Navy had been to investigate the possibilities of the use of land planes in naval operations. It was possible in calm weather and with a calm sea for a seaplane to be lowered from the mother ship to the water, to take off from the water, and to return and land upon the water near the ship and then be hoisted aboard, but even a comparatively small disturbance of the sea was sufficient to render this difficult and dangerous. Moreover, in battle it is frequently impracticable for a ship under way to stop to pick up planes. The method of launching seaplanes from catapults did not solve the problem, because it was still necessary for the seaplane to land on the water and he recovered by the ship. It was recognized that land machines were superior in speed, range, and other features of performance and usefulness to seaplanes, and the aim of the Navy was to utilize land planes operating from the deck of a ship.

Reporter's Statement of the Case This desired operation presented many problems. The problem of landing in the restricted area of a ship's deck was difficult, and additional difficulties were presented by the disturbance of the air created by the ship's movement, the discharge of combustion gases from its power plant, and the roll and pitch of the deck, all of which factors were variable. The pilot had to be able to fly through more or less turbulent air and to follow more or less the roll and pitch of the moving deck and still achieve a landing in an extremely restricted area.

4. Prior to July 14, 1922, the filing date of plaintiff's patent application which matured into the patent in suit, the Navy had produced no satisfactory solution of this problem, and was still conducting experiments.

In 1919 the United States Navy had no airplane carriers. The British Navy then had at least one. American naval officers realized that the development of aircraft carriers was desirable, although many officers were skeptical of the possibility of successfully landing airplanes on carriers. In that year Congress appropriated funds for the conversion of the collier Jupiter into an aircraft carrier, which was subsequently renamed the Langley. The Langley was intended primarily to be used for experimental nurposes and

the training of personnel.

For the purpose of trying out various methods of arresting airplanes in a restricted landing area, an experimental landing platform or "dummy deck" was built on land at Hampton Roads in the summer of 1920, but it was built on soft ground and settled so badly that it had to be rebuilt. The rebuilding was not completed until late in 1921. On this platform a number of different forms of airplane arresting

apparatus were constructed and tested. The Langley was commissioned March 20, 1922, at which time the experimental activities were transferred from the "dummy deck" at Hampton Roads to the Langley. Many of the devices tried were found to be impractical or inoperative and were abandoned.

5. The patent in suit discloses mechanism for hooking an airplane while in flight to a stationary arresting apparatus, which applies a gradual retarding force to the airplane, lands it, and brings it to a stop in a very short distance.

The mechanism consists of two cooperating parts—one carried by the airplane, the other mounted upon the landing area, which the patent states may be a ship's deck. The mechanism at the landing area will hereafter be referred to as the "landing\_area mechanism" and that upon the aircraft as the "airplane mechanism."

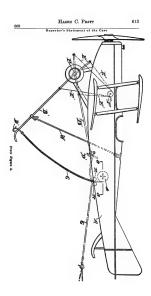
The landing-area mechanism comprises an arresting cable wound on a form of rums and passing through pulleys and having a portion stretched transversely across the landing area and elevaried above the surface thereof. The drum or drums upon which the cable is mounted are retatable to pay out a limited amount of cable, but their rotation is resisted by springs.

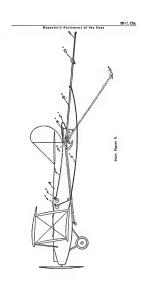
The airribase mechanism consists of a note mounted below

An extynate mechanism consists on a pole monnec nearest hereof, pivoted as one end, having the other end releasably held against the fuseling so that the free end may be dropped to a precidentimion position well below the landing grar, this being the position for engaging the arresting cable. When the pole is in landing position it extends obliquely downwardly from the airplane, with its lower end projecting one distance below the bottom of the landing polycing one distance below the bottom of the landing

On the aft end of the pole in landing position there is a stout hook, and a connection is provided from the hook to the airplane fuselage at a point some distance in the rear of the center of gravity of the airplane and approximately in fore-and-aft alignment therewith.

In one form of the invention (Pratt, fig. 8, reproduced herewith) the hook D' is removably held on the pole B' and is detached from the pole when it hooks on to the arrest-detached from the pole when it hooks on to the arrest-detached hook to the fundage by a chile G. In another form (Pratt, fig. 9, reproduced herewith) the hook D' is not detachable, and the pole D' itself server to transmig force to the fundage at a point in the rear of the most of the fundage at a point in the rear of the fundage at a point in the rear of the fundage at a fine the pole D' in formal G is the fundage at a point in the rear of the fundage at all the pole D' in formal G is the fundage D' in G in G is the fundage D' in G is the fundage D' in G in G is the fundage D' in G in G





In making a landing with the apparatus disclosed in the potent in sait, the pilot fires toward the arresting gear and in an in the pilot fires toward the arresting gear and in position to strike the arresting cable. The pilot files sufficiently low so that the pole will strike the arresting cable as the airplane crosses; it, whereupon the cable is guided by the pole into the hook and, as the sirplane files on, the principal content of the pilot guidedly reduces the speed of the airplane without any substantial tendency capting. The retarding force on applied guidadly reduces the speed of the airplane without any substantial tendency to tilt or upset it, and as its speed diminishes it sinks to the lending surface and stops. The retarding force is greater the speed and weight of the machine and the

The application of the retarding force to the plane below the center of gravity would introduce a positive force, tending to cause the plane to nose over, this nosing-over force being the greater the heavier the airplane, the greater the speed at the time of hooking on, and the farther below the center of gravity the retarding force is applied, other things being the same. When the force is applied in the rear of the center of gravity and approximately in fore-and-aft alinement therewith, not only is there no force introduced tending to tip the plane, but should such a force be introduced for any reason, such, for instance, as by the landing wheels striking an obstruction, the retarding force applied by the arresting cable tends to hold the tail down and prevent nosing over. Similarly, should the plane tend to be slued around, as by only one landing wheel striking an obstruction, or by a cross wind, the force applied by the arresting cable tends to straighten the machine out and hold it in proper alinement,

6. Prior to the date of filing his patent application, whice matured into the patent is suit, plaintiff had devoted much time and thought to the problem of landing airplanes in a vastricted area. How assequated not only with the those orical aspects of the problem, but with certain of its practical aspects as well. He had been trained as a real valutor, commissioned and been made a flying interactor, and his experience included and been made a flying interactor, and his experience included over of 1918 by any inturn of in an airplane crash, and later over of 1918 by any inturn of in an airplane crash, and later discharged from the service for resulting physical disability, and returned to Masschusetts Institute of Technology to complete his compsete his compsete his compact part in 1922 after specializing in the study of a viation and related subjects. He received compensation for his disability, and part of his college expenses after his discharge was paid by the Veterans' Bureau as compensation for his college.

7. The apparatus disclosed in figure 5 of the patent is suit was conceived by plaintiff at least a sery is MRA-18, 1920. It was shown in a betch dated March 11, 1920, and was disclosed to others by May 18, 1920, and shown and described in his first patent lapplication, filed on that date, serial on 38250M. Among others, this revention was disclosed to Factory in Philadelphia. Commander Westervelt recommended a demonstration to the Navy.

8. Plaintiff during the summer of 1920 began the construction and assembly of apparatus required for actual tests of his idea. By August 1920 he had completed it as far as it was possible for him to go without an airplane upon which to install it. His means were not sufficient to purchase an airplane and so he set about obtaining the use of a Navy plane. On Angust 27, 1920, he interviewed Commander J. C. Hunsaker, disclosed his sketch of March 11, 1920, described his idea, and requested authorization to use a Navy airplane and flying field facilities to test it in actual flight. This the Navy promptly agreed to do, provided that plaintiff would fly the airplane in the tests, to which plaintiff assented. The Navy furnished plaintiff blueprints of an "Aëromarine 39B" airplane, and plaintiff then made the necessary additions to his apparatus to fit it to the airplane, and shipped the apparatus to the Naval Air Station at Anacostia, D. C., where he supervised the determination of the location of the center of gravity of the airplane and the application to it of his arresting gear substantially as shown in figure 5 of the patent in suit. After the apparatus was nearly ready for test, a fire occurred on October 16, 1920, destroying the hangar and the airplane on which the apparatus was installed, and damaging the apparatus.

Reporter's Statement of the Case

The Navy agreed to repair the damage at the Naval Aircraft Factory at Philadelphia and plaintiff shipped his apparatus there. Delays were encountered and plaintiff made a number of trips to the Naval Aircraft Factory for the purpose of expediting the work. These trips were made during such times as plaintiff was able to absent himself from his studies at Massachusetts Institute of Technology. During these trips plaintiff explained his apparatus to various people. including Lieutenants Barnaby and Fellers of the Navy.

November 15, 1920, Lieutenant Fellers wrote plaintiff suggesting certain changes in the apparatus. On November 22, 1920, a letter was written by the Naval Aircraft Factory to the Bureau of Construction and Repair, inclosing photographs of plaintiff's landing gear and referring to changes in dataile

December 14, 1920, Lieutenant Fellers, in the presence of plaintiff, dictated a report entitled "Pratt Arresting Gear," describing certain proposed changes, and a sketch was attached to the report illustrating such changes. In this report it was suggested that plaintiff's apparatus was not believed to be new because of certain British experiments and because of certain work by Captain Mustin, but no claim was made that any of the Navy personnel had made any inventive contribution to plaintiff's system.

The Bureau in an order dated January 7, 1921, entitled "Pratt Arresting Gear," directed that Pratt's apparatus be repaired in its original form and that alternative apparatus be constructed to embody the changes suggested in the report of December 14, 1920. This alternative apparatus was never used. Plaintiff himself constructed another alternative apparatus and shipped it to the naval air station, but that alternative apparatus was never used. By September 1921 the repaired arresting gear was ready for flight tests and was substantially that shown by figure 5 of the patent in suit.

9. The first flight test occurred on September 15 or 16. 1921, when plaintiff flew the airplane equipped with his arresting gear into the stationary retarder. The airplane was flown over the arresting cable with the pole lowered so that the book projected well below the landing year. The book en-

Reporter's Statement of the Case gaged the arresting cable satisfactorily and the airplane was landed and its speed retarded to about 10 miles an hour, when a defective cable connection parted. Plaintiff then returned to Cambridge, Massachusetts, to continue his studies, and on October 11, 1921, resumed the testing. In these resumed tests, during an attempted landing, a defect developed in the brakes intended to resist the paving out of the arresting cable, the cable ran out free, tangled and broke, and the plane overturned, suffering some damage. After repairs to the plane, tests were resumed on October 19, 1921, when, after several unsuccessful attempts in which the pilot was unable to engage the arresting cable with the book, a successful hooking on was accomplished with the plane in flight at a speed of about 45 miles an hour, and the plane was landed and brought to a stop as intended in a distance of 132 feet after hooking on, the brakes being applied for the last 107 feet.

10. A written description of the tests was made by plaintiff concurrently and witnessed by persons assisting in them, which description was supplemented by photographs and is in evidence as plaintiff's exhibit J, made a part hereof by reference.

11. An official report of the tests was made by Commander Stone to the Navy Department, but Commander Stone did not recommend the Pratt gear because of the fact that hooking on was accomplished with the plane in flight. Commander Stone recommended that hooking on should not occur until after the plane had reached the ground, and criticized certain features of the apparatus.

12. It is not proved that the Navy, or any of its personnel associated with Pratt in the tests, made any investive contribution to the Pratt system, or that they had anything to do with the development of the Pratt system other than furnishing the airplane and flying facilities to Pratt and repairing the sponsrus damasced by the fire.

13. On May 18, 1920, plaintiff filed an application, serial no. 382324, in the United States Patent Office. This application was prosecuted to allowance on April 6, 1921, with 10 claims substantially identical with claims 1 to 10 of the patent in suit and with a disclosure of the Case ent in suit and with a disclosure of figures 1 to 8 substantially identical with those of the patent in suit. This application, after being successfully prosecuted to allowance, was forfeited for failure to pay the final feature.

14. Subsequently, on July 14, 1929, palantiff filed a re-newal application embodying, in addition to figures 1 to 8 of the original application, figures 9 and 10 of the petent in suit and additional claims. This new application was prosecuted to allowance and matured into the patent in suit on July 1, 1924. On October 17, 1925, plaintiff wrote to the Bureau of Aeronauties, calling attention to his demonstration, and resursed information as to the attitude of the

Bureau toward compensating him.

Plaintiff subsequently in letters during the period November 1926 to June 1926 notified the Navy of the issue of his patent and charged that the Navy was infringing it; the Navy's view, as set forth in its replies, was that no valid claims of the patent had been infringed; thereafter plaintiff filled.

his petition in this court.

15. The mechanism installed upon the landing area on the dock of the Longheyan due used during the time in suit comprised a number of longitudinal cabbas arranged in parallel control of 1-15 inches above the ocks, a distance slightly less than the radius of the landing wheels, by "fiddle bridges," since the cabbase that the radius of the landing wheels, by "fiddle bridges," since the cabbase of the control of the landing wheels, by "fiddle bridges," and at the desired height, but which when struck by the Innding at the desired height, but which when struck by the Innding to the roll of the business.

Immediately below the longitudinal cables were cables stretched transversely across the deck. The ends of each adjacent pair of cables were attached to other cables which in turn passed over pulleys in the deck down into the hold of the ship where there were weights mounted in towers in such a way that when the transverse cable was engaged and pulled forward, the statched cables picked up the weights, applying

a progressively retarding force to the transverse cable.

16. A drawing entitled "General Type Plan Airplane Arresting Gear Equipment" dated June 7, 1926, introduced in

Reporter's Statement of the Care evidence as defendant's exhibit 12 and made a part hereof by reference, shows the arresting gear used by the Navy which is charged to infringe plaintiff's patent. The alleged infringing structure is that shown as "Type A" and was used on airplane types FB-5, F6C-2, and M-74. The mechanism consisted of a pole pivotally mounted on the airplane fuselage and terminating at its aft end in a hook. The pole could be raised and lowered under the control of the pilot. When raised it lay substantially along the bottom of the fuselage and had only a limited lateral movement. When lowered the pole and book extended obliquely backward and downward with its lower end extending below the plane of the bottom of the landing wheels and tail skid, for engagement with the transverse cables. The plane was also provided with axle hooks for engagement with the longitudinal cables to guide the plane longitudinally on the deck and to prevent its vawing and going over the side of the ship.

The landing method used by the defendant may be described as follows:

The carrier was headed into the wind and maintained at

a definite speed to produce a normal air speed longitudinally of the deck of approximately 25 miles per hour.

The pilot approached the stern of the carrier to a point astern the vessel where he came under the direction of the Flight Deck Officer, from which point on he controlled the position and attitude of his plane under the direction of that officer. The Flight Deck Officer then, by means of visual signals, instructed the pilot to increase or decrease the speed of approach and elevation and attitude of the airplane relative to the deck of the carrier, until a certain position aft of the stern was reached. At this point the airplane was put in a tail down attitude such that as the airplane came down to the deck the wheels and tail skid would contact the deck in a normal 3-point landing attitude in the approximate location of the second transverse cable, about 60 feet from the stern of the vessel. If the Flight Deck Officer was not satisfied that the pilot had reached the desired point astern of the vessel, he waved the pilot away to make a better approach

When the airplane reached the position desired by the

side.

Reporter's Statement of the Case
Flight Deck Officer, the pilot cut his throttle and brought
his plane in for a 3-point landing on the deck in the same

In the usual and most desirable landing the trailing hook on the plane passed over the first transverse cable without engagement, contacted the deck, and then dragged along the deck into engagement with the second transverse cable, the axle hooks in the meantime engaging the longitudinal cables which maintained the airplane in a straight forward direction along the shin, and movement awaives and pluning over the

manner as he would upon the ground.

The wheels and tail skid may have contacted the deck before the wheels passed the transverse cable which was to be engaged, in which case the wheels rode down that cable which was mounted in such a way as to permit it to rise again for engagement with the trailing hook. The wheels and tail skid may have contacted the deck astradid the transverse cable, or the wheels and tail skid may have contacted the deck attracted the contacted the deck into t

In the apparatus used by the United States there was no

retarding force exerted at the instant when the trailing hook engaged the transverse cable nor was any exerted until the cable was deflected into a V and drawn out to a point where the connecting cable began to pick up the weights in the hold of the vessel.

The airplane continued its roll along the deck for a dis-

Anne anjoine of the interest and a single deal of a time that of some 50 feet in a tail-down attitude with a retarding force (progressively increasing to a predetermined value and thereafter remaining constant) applied thereto from the transverse cable which was located below the longitudinal cables (14-16 in ches off the deck) while the center of gravity

of the airplane was some 5 feet above the deck.

The major portion of the retarding force was applied to the trailing hook by the transverse cables located and retained by the longitudinal cables at an elevation below the azle of the airplane, i. e., 14–16 inches above the deck as distinguished from 4–5 freet, the elevation of the center of gravity of the airplane above the deck. The retarding force applied to the airplane above the eggement of the azle hooks with the longi-

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tudinal cables varied from a negligible amount to as much as 15% of the total retarding force applied to the airplane.

as 15% of the total retarding force applied to the airplane.

The hook, while in attachment with the arresting cable, lay at an angle of approximately 24 degrees below horizontal.

The application of the retarding force 14 inches off the deck tended to cause the tail to rise. This tendency was opposed by the other forces acting on the airplane, such as the vertical force on the wheels in contact with the deck forward of the center of gravity and the downward servolynamic force on the elevator which held the plane in the three-point landing attitude.

The legend appearing in defendant's exhibit 12, "Line of pull at least 3" and not more than 10" above center of gravity," had reference not to the direction of the retarding force but to the location of cables inside the fuselage transmitting the strain from the hook attachment to stronger parts of the fuselage.

17. The claims of the patent in suit here relied on are as follows:

1. Aircraft landing mechanism, comprising a catch on the craft adapted to engage a stationary relarder, said catch being connected to the craft in such manner that he retarding force applied thereto is transmitted to the craft in the rear of the center of gravity and approximately in fore-and-aft aliments with the center of gravity, whereby the craft may be retarded in landing without substantial tendency to overturn.

2. Aircraft landing mechanism, comprising a catch on the craft adapted, in its operative position, to engage a stationary retarder, said catch being so disposed in the rear of the center of gravity of the craft as not to project beyond the lateral outline of the subsage of the craft, and means adapted to be projected beyond the vertical outline of the body of the craft to guide the said retarder and eatch into engagement.

8. Aircraft lauding mechanism, comprising a catch on the craft, which when in its operative position will engage a retarder, said catch being so disposed in the rear of the center of gravity of the craft as not to project beyond the lateral outline of the students of the craft and are destending obliquely from the craft beyond its vertical outline, to guide the retarder and catch into engagement.

Reporter's Statement of the Case

4. Aircraft landing mechanism, comprising a member adjustably supported on the plane, a hooked member carried by said adjustable member for engaging landing mechanism and attached to the plane at a point in the rear of its center of gravity, and means within the control of the pilot for moving said adjustable member to desired positions.

Airplane landing mechanism, comprising a hook to engage the landing device, a member attached to the plane and adapted to guide said hook and landing device into engagement and a support for the hook near the end

of said guiding member.

7. Airplane landing mechanism comprising a landing device at a fixed location, a member pivoted to the plane, an engaging hook supported near the end of such member, which latter is adapted to guide the said landing device and hook into engagement, and means within the control of the pilot for adjusting said guiding member to desired positions in relation to the body of the plane.

8. Airpfane landing mechanism, comprising a guiding member pivoted to the airpfane and adapted to be moved to an inclined position extending beyond the limits of planes bounding the vertical area of the fuseign of the airpfane, a device attached to the plane and provided with a hook to engage landing mechanism and means within the control of the pilot for adjusting the guiding member to desired positions to adapt it to cause the

landing mechanism to engage said hook.

9. Airplane landing mechanism, comprising a landing device, a guiding member therefor pivoted to the indig device, a guiding member therefor pivoted to the situation within the area between planes bounding the vertical limits of the aircraft fussiges, means attached to the airplane in the war of its center of gravity to ensure the situation of the situation

11. Airplane landing mechanism consisting of an arm pivoted to the plane, a hook supported at the free end thereof which is adapted to engage a retarding device upon the landing surface and means connecting the plane and said arm which is adapted to cause the arm always to assume a position longitudinally in line with the direction of the retarding force applied.

 Airplane landing mechanism, comprising a member pivoted to the airplane for guiding the landing device, a hook attached to asid member at its free end to engage the landing device, a universal joint between the hook and the airplane and means within the control of the pilot to cause said member to assume desired positions outside of the area between planes which bound the vertical limits of the airplane structure.

13. Aircraft landing mechanism, comprising a landing device at a prescribed location, an adjustable member attached to and projecting from the aircraft, an engaging hook normally supported by said member, which latter is adapted to guide the landing device and hook into engagement, and universal connection be-

tween the hook and aircraft.

14. Airplane landing mechanism, comprising a stationary retarder on the landing surface, an arm attached to the airplane, a universal joint between the plane and the arm to permit the ready adjustment of the latter to the direction of the pull of any retarding force and a hook at the free end of said arm which is adapted to engage said retarder.

15. The method of landing airplanes which consists in applying to such plane from a fixed retarding device at the landing surface while the plane is still in flight, a force which acts in the rear of its center of gravity and tends to maintain the plane in an upright position when it strikes the landing surface.
16. The method of landing aircraft upon restricted

landing surfaces, which consists in guiding the plane above such surface in proximity thereto and parallel therewith, and while still in flight applying a retarding force to the craft in the rear of its center of gravity by means located upon the landing surface, and continuing the application of such force until the plane comes to rest.

18. On July 14, 1922, there were available the following patents and publications:

United States patent to C. A. Smith, no. 565805, issued August 11, 1896 (deft's ex. 40);

United States patent to G. H. Curtiss, no. 1223315, filed Nov. 22, 1913, issued April 17, 1917 (deft's ex. 54);

United States patent to H. C. Mustin, no. 1160525, filed Feb. 18, 1915, issued Nov. 16, 1915 (deft's ex. 42);

United States patent to H. Kleckler, no. 1290236, filed April 16, 1917, granted Jan. 7, 1919 (deft's ex. 43); 606

United States patent to G. H. Curtiss, no. 1368548, filed

Jan. 21, 1915, issued February 15, 1921 (deft's ex. 63);
United States patent to L. J. Le Mesurier, no. 1815320,

filed June 10, 1919, issued Sept. 9, 1919 (deft's ex. 44); United States patent to G. B. Vroom, no. 1488572, granted

April 1, 1924, on an application, Serial no. 523943, filed Dec. 21, 1921 (deft's ex. 46, 46a); United States patent to J. H. Cruickshank, no. 1451493,

United States patent to J. H. Cruickshank, no. 1451493, filed Nov. 26, 1921, issued April 10, 1923 (deft's ex. 45); German patent to H. Strieffler, no. 227242, filed Sept. 8, 1908, published Oct. 17, 1910 (deft's ex. 50 and translation

50-a);
German patent to H. Strieffler, no. 227243, filed Nov. 27,

1908, published Oct. 17, 1910 (deft's ex. 51 and translation 51-a);

German patent to H. Strieffler, no. 227244, filed May 25, 1909, published Oct. 17, 1910 (deft's ex. 52 and translation 52-a);

French patent to LaCoste, no. 425639, filed January 15, 1911, published June 15, 1911 (deft's ex. 53 and translation 53.a)

50-a1;
French patent to A. von Keissler, no. 446667, filed July 30, 1912, granted Oct. 7, 1912, published Dec. 12, 1912 (deft's

ex. 72 and translation 72-a); British patent to A. von Keissler, no. 18171 of 1912, filed

Aug. 7, 1912 (deft's ex. 48);
British patent to A. von Keissler, no. 18178 of 1912, filed

August 7, 1912 (deft's ex. 49); Austrian patent to A. von Keissler, no. 62635, filed July

20, 1912, published Dec. 27, 1912 (deft's ex. 47 and translation 47-a);

British patent to Armstrong Whitworth & Company, Ltd. (British patent to Le Mesurier), no. 131398, filed June 24, 1918 (defendant's exhibit D-85);

British patent to Whiteway, no. 132092, filed October 4, 1918 (defendant's exhibit D-81);

San Francisco Call of January 19, 1911 (deft's ex. 24); San Francisco Chronicle of January 19, 1911 (deft's ex. 24); Reporter's Statement of the Case

San Francisco Examiner of January 19, 1911 (deft's ex. United States Naval Institute Proceedings, vol. 37, no. 1,

March 1911, pages 163-207 (deft's ex. 38); Aeronautics, issue of March 1911, pages 95-97, inclusive

(deft's ex. 39): Aeronautical Engineering-Supplement to The Aeroplane,

issues of Nov. 5, 1919 (pp. 1589-1594, inclusive); Nov. 12, 1919 (pp. 1661-1666, inclusive); Nov. 19, 1919 (pp. 1748-1746, inclusive); Dec. 10, 1919 (pp. 1911-1912, inclusive); Dec. 17, 1919 (pp. 2013, 2014, 2016), available to the public in the Library of the Smithsonian Institution, Washington, D. C., subsequent to January 2, 1920 (deft's exs. 69 and 79);

All the World's Aircraft-1920 (pages 21s to 36s, inclusive), available to the public in the Library of Congress, Washington, D. C., since January 20, 1921 (deft's exs. 67 and 78).

Each of the above patents and publications is made a part

hereof by reference. German patents to Strieffler, Nos. 227242, 227243, and 997944. defendant's exhibits 50, 50-A, 51, 51-A, 52, and 52-A, disclose an arresting gear for aircraft, in which a cable is stretched between pylons, intended to be used with lighterthan-air and heavier-than-air craft. So far as there is any disclosure of the apparatus installed on a heavier-than-air machine, it contemplates a post extending vertically through the airplane and terminating in a hook projecting above it. The plane, after engaging the cable and being arrested, remains off ground, dangling on the cable. German patents Nos. 227243 and 227244 to Strieffler relate particularly to improvements by which the shock of engagement between the

aircraft and the cable is reduced. There is no evidence that the devices of these patents were ever constructed or used, and there is no disclosure of landing and stopping an airplane by applying to the plane while in flight a retarding force at a point in the rear of the center of gravity and in approximately fore-and-aft alinement therewith.

26. French patent No. 425639 to La Coste, defendant's

exhibit cs and c5-n, discloses apparatus of the same general character, in which an arresting cable is supported to the control that the contr

2.4. Von Aelnister de sinks patenten obto. 13.1 and hat is, see 2.4. Von Aelnister de sinks patenten obto. 13.1 and hat is, see No. 66935, derendant's exhibits at' and 47.4, and Freuch patent No. 446607, defendant's exhibits 72 and 72-4, discises various types of drug brakes, such as rakes or plows, vertically movable under the pited's control, located undertendant proposition of the proposition of the proposition of the ground to calcule the plane withis at rest and also to eath in the ground to check the roll of the plane after the proposition of the plane, but of the renging is astionary refarcting mechanism while the plane is in flight and do not organic to load the plane, but only to check the roll of the proposition of the plane, but only to check the roll of the

Claim 4 of the patent in suit in terminology does not recite structure different from that of the von Keissler patents, and these patents are anticipatory of claim 4.

22. U. S. patent to Curtiss, No. 1368548, defendant's exhibit 63, discloses a ground brake not substantially different from that of the von Keissler patents discussed in finding 21.

22. U. S. patent No. 1100055 to H. C. Mustin, defendantly ethniked, defendantly ethniked, defendantly ethniked, defendantly ethniked, and the defendant ethniked of a "drogue," a kind of water brake or drag attached to the tail of a seaplane by means of a cable. In making a landing, the pilot releases the drogue, which drives into the water and pulle down the tail of the plane, thus assuring statement of the property of the plane of the positions of the positions in the water and pulled and providing it from burying the none of the positions in the water and tending to overture.

24. In 1911 Eugene B. Ely made a landing on the U. S. S. Pennsylvania in San Francisco Harbor. This landing was in the nature of a "stunt" and received much newspaper publicity. For this landing a special deck was built on the

Reporter's Statement of the Case Pennsylvania and a large number of ropes were stretched transversely at intervals across the deck with sandbags at each end. The ropes were held a few inches off the deck by means of beams laid longitudinally, and pivotally mounted hooks were provided on the landing gear of the airplane, resiliently held in position by springs. As the airplane came in to land, it alighted upon the deck, and, as it rolled forward, the books on the landing over picked up the ropes progressively and dragged the sandbags along and the drag of the sandbags arrested the roll of the plane. The hooks were disposed below the center of gravity and in the rear thereof. The airplane employed was the now obsolete type of Curtiss pusher machine, a slow and light machine with a three-wheeled landing gear, one wheel being carried upon an outrigger in front of the machine. With this type of landing gear a considerably greater upsetting force could be employed without nosing the machine over than with the later types, in which the forward wheel was done away with.

Claim 11 fails to distinguish structurally from the hook mechanism used by Ely in his landing on the Pennsylvania and is anticipated thereby. 25. Some time prior to March 18, 1920, experiments with simple arresting cear were carried on at the Isle of Grain.

England. Some of this experimental work was described

in printed publications as follows:
Jane's All the World's Aircraft—1919, defendant's exhibit
71; Jane's All the World's Aircraft—1920, defendant's exhibit 67; Aeronautical Engineering—Supplement to The
Aeroplane, issues of November 5, 1919, to December 17, 1919,
defendant's axibitis 69

In some of the mechanisms experimented with, as described in these publications, the airplane was equipped with a hook hinged or attached by a bridle below or on the bottom of the airplane fuselage and somewhere near in vertical slimment with the center of gravity.

vertical alinement with the center of gravity.

The apparatus described by these publications was experi-

The apparatus described by these publications was experimental and none of it provided a satisfactory solution of the problem.

26. Personal knowledge of certain of the Isle of Grain experimental apparatus was introduced into this country

by a report of Lieuteanat Hague, an American Naval officer who winessed some of the experiments and filed a report, which was rewritten by other Navy personnel in London and forwarded to the Navy Department in Washington, D. C. This report was not a printed publication but was confidential Navy Department correspondents of the Navy Department or respondents.

connectual vary Department correspondence.

27. The patents to Strieffer (see finding 19), LaCosta (see finding 20), Vox Keiselser (see finding 23), Ourties (see finding 22), Mustin (see finding 22), and the publications concerning the Isle of Grain experiments (see finding 23) not displose the disc of arresting an airplane while in flight by applying a retarding force in the rear of the center of gravity and approximately in horizontal alienment there-

with.

In the Ely demonstration the plane was not arrested while in flight and the retarding force was not applied behind

the center of gravity and in horizontal alinement with it.

St. U. S. Patent to Cruichealmy, No. 1454/489, patented
April 10, 1926, on an application filed November 26, 1921,
vided with a trailing hook for engaging a stationary arresting
cable. It contains no disclosure that the rearresting force is
applied to the simplene at a point in the rear of the conter of
gravity and in force-and-aft alinement thesewith. The filing
to plaintiff adds of conception, May 18, 1920, absospent to
the date of the successful demonstration of plaintiffs appear
to the Nary authorities in October 1921, and antespect
to the filing date, May 18, 1920, of his forf-ided application,
to the filing date, May 18, 1920, of his forf-ided application,
the price to the filing date, July 3, 1920, of his con-

39. U. S. patent to Vroom, No. 1488V2p, patented April. 1984, on an application filed Docember 91, 1991, disclose apparatus for arresting an airphane, the airphane being provided with a trailing hook for engaging an arresting cable, the hook being "so attached that the pull will come at or near the center of gravity of the plane". Like the patent to Crinichank, the date of application of the Vroom patent his mooseful demonstration to the Navy authorities, and

Reporter's Statement of the Case subsequent to the filing date, May 18, 1920, of his forfeited application, but prior to the filing date, July 14, 1922, of his renewal application.

and the production No. (31986 to Le Meurire the sixplane is provided with a pole privoted at its forward end on the under side of the fuselage and ending in a blook. The pole can be raised and lovered, and when lowered it attendes obliquely backward and downward from its point of attachment. In the provisional specification, page 8, at a point which is as near as possible to the centre of gravity of the machine so that he latter will have no tendency to tip when being arrested; "while in the complete specification, page 7, time 84, it is described as attached "at a point which is as near as possible to the outer of gravity of the best produced by the second of the machine of the control of the control

Figure 2 of the patent, reproduced below, is stated to be a "somewhat diagrammatic side elevation showing the manner in which the loops are engaged by an aeroplane when alighting." With the hook in the position shown in the figure, there would be some tendency for the plane to nose over and strict the deck.

The landing area mechanism disclosed in the patent consists of a series of cables held above the deck a distance slightly less than the radius of the landing wheels of the plane and equipped with loops extending transversely across the deck. The patentee, page 2, lines 35-36, describes the operation of the apprartius as follows:

Thus when an aeroplane is about to alight as it comes down on the landing surface it will pass in succession over these loops and a hook suitably disposed on the under part of the aeroplane will engage with certainty one or other of the loops.

one or other of the loops.

It would be possible for the hook to engage a loop before
the landing wheels had touched the deck.

the landing wheels had touched the deck.

31. United States patent No. 1313820 to Le Mesurier has
reference to the same arresting gear as that disclosed in
British patent No. 131398. The patent contains the same
drawings and the written descriptions and disclosures are

Substantially identical in the two patents. However, the United States patent in the description of the operation of the apparatus contains the words appearing in italics which are not in the British patent:

Thus when an aeroplane K is about to alight as it comes down on the landing surface A it will pass asshown in F(g, 2) in succession over these loops and a hook F suitably disposed on the under part of the aeroplane will engage with certainty one or other of the loops.

The text of the specification does not disclose applying the retarding force at a point in the rear of the center of gravity and substantially in fore-and-aft aliment there with but at the center of gravity includi. If the application of the retarding force were made at the center of gravity itself there would be not tendency of the plane to overturn as a result of this action of the extarding force, but, on the other hand, the retarding force would not then act to oppose any about the contract of the con

The broad terminology of claim 5 of the patent in suit is sufficiently comprehensive to fairly define the defendant's structure in which the hook is not detachable from the pole, and such terminology also fairly describes the Le Mesurier structure, and the Le Mesurier structure is anticipatory thereof.

Claims 7 and 8 of the Pratt patent in terminology fail to distinguish over the structure of Le Mesurier in that they fail to point out that the restraining force is applied behind the center of gravity and in fore-and-aft alinement therewith. The Le Mesurier structure is anticipatory with respect to these claims.

Insofar as the hook might engage the landing area mechanism before the landing wheels contacted the deck, the Le Mesurier structure anticipates claims 15 and 16. These patents anticipate claims 12, 13, and 14 of the patent in suit, except as to the use of a universal joint or connection, as to which, see finding 34.

Reporter's Statement of the Case There is no evidence that any plane was ever built or operated according to Figure 2 of the Le Mesurier patents.



32. The British patent to Whiteway (defendant's exhibit D-81) illustrates and describes arresting gear for the landing of aircraft where the available run on landing is restricted.

The portion of the equipment on the landing area comprises a series of parallel cables arranged in tension at a suitable height above the landing area, these cables running fore and aft or parallel to the path of travel of the airplane instead of transverse thereof as disclosed by the Pratt patent in suit. Intermediate their ends and as shown in Figure 1 of the drawings, over one-third down the length of the landing area or runway, the cables are provided with forked or Y branches, the adjacent branches being passed through movable retarding rings located about two-thirds of the way down the landing area. These rings are so designed as to rather closely encircle the two adjacent cables so that as the rings are pushed along these cables, friction will result and an arresting force will thereby be set up.

The equipment located on the plane consists of a plurality of snap rings or clips carried on the main axle and projecting downwardly betterform, the function of these clips being to encircle or trap the longitudinal cables when the plans is landed, and as the plans then subsequently volid forward on the landing surface the Y or spread portion of the cables engaged the clips and causes a retarting or braking effect. When the plans rolls still further the clips will come in our-tack with the rings and point them along the cables, there were the result of the control of the cables engaged the clips and point them along the cables, the cable of the cables of the cables of the cables of the clips will come in our town with the cables of the cabl

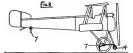
In operation on the aircraft alighting on the surface 1 and running along the same the wires immediately engage in the clips and on the clips reaching the forked branches increased resistance is offered by these branches and by the rings 6 being forced along two adjacent branches, thus materially assisting in bringing the aircraft to rest.

## The specification also states:

If desired, the tail of the aircraft may be provided with clips 7 of a similar nature to those hereinbefore described, and carried by a support arranged in such a way as to allow the clips to be raised or lowered by the aviator as required.

The specification also indicates that this support near the tail of the aircraft may be hinged to the tail to allow the clips to be raised and lowered. This construction is diagrammatically shown in Figure 8, which is reproduced herewith, no further details or constructional features being given.

This figure shows the still clips located show the threepoint line of the wheels and tail dail and projecting vertcally downward from the sirplane. However, the statements in the specification that the support might be hinged and so arranged as to allow the clips to be raised or loweved as desired prevent the drawing in Figure 8 from limiting the location and length of the still clip to that shown in Figure. 8 The clip could, under these disclosures, be dropped below the line of the wheels and tail sidd if desired, as, for example, to more readily restard a plane while it was still in the as



The Whiteway patent discloses a catch on an airplane adapted to engage a stationary retarder, the catch being connected to the airplane in such a manner that the retarding force may be applied to the airplane while still in flight, and in the rear of and approximately in fore and aft alinement with the center of gravity. The catch in the Whiteway patent, even as located as

shown in Figure 8, could engage the retarding cable while the plane was still in flight if the plane passed over the cable in a tail down attitude or if the plane descended across the cable in such a direction that the front part of the landing gear passed over the cable and the catch engaged before the wheels touched the deck. Claims 1, 15, and 16 of the Pratt natent in suit are readable upon the disclosure of this natent.

33. The disclosures of claims 2, 3, and 9 are a combination of Le Mesurier's arm and book with Whiteway's point of attachment and do not amount to invention.

34. Claims 19, 13, and 14 of the Pratt patent in suit add to the devices previously discussed the use of a universal connection between the plane and the rod. Whiteway taught that his catch near the tail of the plane might be hinged so as to permit it to be raised or lowered. Le Mesurier emploved a hook attached to an arm which was pivoted beneath the fuselage. The hooks used on Elv's plane were described as "pivotally mounted," which disclosed a universal connection. Hence the use of a universal connection in place of the hinged or pivotal mountings previously used is not invention, and claims 12, 13, and 14 are not made valid by the inclusion of this device.

Opinion of the Court

35. The claims of the Pratt patent in suit are invalid.
36. The mechanism employed by the defendant during the period here involved did not infringe plaintiff's patent if the patent was valid.

The court decided that the plaintiff was not entitled to recover.

Marons, Judge, delivered the opinion of the Court:
This is a patent case in which plaintiff charges the defendant with the infringement of all the claims, except claims 6
and 10, of United States Patent No. 1869472, issued to
plaintiff, Haron C. Pratt, July 1, 1984, for "Airjane Landing Mechanism." On February 8, 1837, this court ren-

plasnitif, Hazen C. Pratt, July 1, 1924, for "Airplans Landing Mechanism". On February 5, 1937, this court rendered its decision sustaining claims 1, 2, 9, 9, 19, 23, 14, 19, and 16 as valid and infringed. \*\*Resen C. Pratt v. The court under the order of December 4, 1939, granting the defendant's motion for a new trial under Section 175 of the Judicial Code. The order authorized the defendants on the present evidence regarding the patients, publications, and viously held valid and infringed, and to present additional violation of the properties o

Pursuant to the order, the defendant on the new trial introduced the newly discovered prior patent to Whiteway (see finding 38) and prior British patent to Le Mesurier (see finding 30) and presented testimony of Capaina Richardson, former head of the Design Branch of the Bureau of Aeronautics of the Navy Department, as to the apparatus and technique employed by the defendant during the period in question.

<sup>\*\*</sup>The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion, on behalf of the United Blants, grant a new trial and stry the payment of any jointment therein, upon such evidence, consultative or charving, as shall maintain the court that any frond, wenge or injustice in the premains has been done to the Online Blants; you turn it as origin an one designing 10.11, was confident by law.

Opinion of the Court The various claims in plaintiff's patent involve an airplane landing mechanism, consisting of a rod attached to the body of the plane by a universal joint at a point in the rear of and below the center of gravity of the plane. with a hook on the end of the rod for the purpose of engaging a retarding device such as a cable stretched on the deck of the ship or other limited area where the plane is to be landed. The rod, withdrawn to lie against the body of the plane while in flight, serves when its hook end is let down by the pilot, to strike on the cable when the plane passes over the cable, and by sliding across the cable to bring the hook into engagement with it. When the cable is caught by the book, it is stretched, whereupon braking devices such as drums or springs or pneumatic pistons at the ends of the cable bring the plane to a gradual stop. Instead of the hook being on the end of the rod, the book might, under the claims, be attached to the end of, for example, a wire or cable connected with the plane, with a rod serving only the purpose of guiding the book into engagement with the cable on the ground or deck. Under that arrangement, the pull would not be upon the rod, but upon the wire or cable attached to the plane. No patent is claimed upon the mechanism on the ground or deck, intended to be engaged by the mechanism on the plane.

Plainfif stressed in his claims the merit of arresting the speed of the plane while in flight, and thus letting it descend to the landing surface after its forward motion had been as the second of the second of the second of the out diagger that the plane would nose over forward or yaw sidewice as a result of the pull, plainfiff specified that the pull of the hook and red should be exerted upon the plane to the rear of the center of gravity of the plane and apportantle's jnd for and at the horizontal alloment with the

center of gravity of the plane.

The defendant claims that the mechanism covered by plaintiff's claims was anticipated by earlier patents, publications, and practices, and that in any event the defendant did not, within the period of the statute of limitations before the bringing of this suit, infringe plaintiff's alleged matent.

As to anticipation, the device of the rod attached to the plane by a hinge or pivot, with a hook at the end of the rod to engage a retarding device on the landing surface was shown by Le Mesurier's United States Patent, issued September 9, 1919. (See findings 30 and 31.) Figure 2 of Le Mesurier's patent is reproduced in finding 31. British, Austrian, and French patents to Von Keissler in 1912 (see finding 21) had disclosed various types of drag brakes such as rakes or plows, vertically movable under the pilot's control and intended to be let down to tear into the earth and stop the progress of the plane after its landing gear had touched the ground. These devices did not contemplate engagement with any retarding mechanism located on the landing field.

Plaintiff claims originality in the attachment of the rod or cable to the body of the plane at a point which would permit the retarding force to be transmitted to the plane in the rear of and in approximate fore and aft horizontal alinement with the center of gravity of the plane. However, the British patent to Whiteway of 1918, referred to in finding 32, Figure 8 of which patent is reproduced in that finding, shows a catch on a plane adapted to engage a stationary retarder, the catch being so located that the retarding force may be applied to the plane in the rear of and approximately in fore and aft borizontal alinement with the center of gravity of the plane.

If, then, the rod and hook were anticipated, and their location on the plane was anticipated, was their being so designed. as to operate to retard the movement of the plane while still in flight, and thus cause it to land, rather than merely to retard the movement of the plane and stop its roll on the landing surface after it had reached that surface, original? We think not. The catch on the Whiteway patent as pictured in Figure 8 would operate that way if the plane were flown across the landing cable in a tail down attitude, or, whether or not the plane was in that attitude, if it descended across the cable in such a position that the front part of the landing gear passed over the cable but the catch engaged it. And the likelihood of such an engagement would be increased by lengthening the catch, or the member connecting it with the body of the plane, or by putting the catch at the end of a 449978-42-CC-vol 95-42

hinged and movable rod, as Whiteway suggested and as Le Mesurier did. Whiteway's patent may not be limited to the exact construction and proportionate dimensions shown on his drawing when his specifications provided in terms for hinging the support, or arm of the catch, and arranging it "in such a way as to allow the clips to be raised or lowered by the aviator as desired."

The Le Mesurier United States patent device could also operate to retard a plane while in flight. Whether it was intended to do so or not is not clear. A portion of the specifications is as follows:

Thus when an aeroplane E is about to alight as it comes down on the landing surface A it will pass as shown in Fig. 2 in succession over these loops and a hook F suitably disposed on the under part of the aeroplane will engage with certainty one or other of the foors.

Figure 2 of the Le Mesurier patent, reproduced in connection with finding 31, cannot be taken as limiting the possible descent of the hook to a point just above the horizontal plane passing through the bottom of the wheels, even taking into consideration the statement in the spcifications "as shown in Fig. 2." (See finding 31.) In the British patent to Le Mesurier of 1918, referred to in finding 20, there is the same Figure 2 and the same written matter as in his American patent, except that the language "as shown in Fig. 2," quoted above, is not present. As to the British patent then there would be no reason at all for limiting the scope of the patent to the exact design shown by the drawing. And when one looks at Figure 2 in both patents it is easy to see why the hook was located as it was in the drawing. The wheels are on the deck, and the hook could not be put lower except by showing it protruding through the deck.

Even if the Le Mesurier patents were limited to the exact design shown in Figure 2, it would be possible for a plane, if it came in in a tail-down attitude, to just miss with its wheels but engage with its landing hook a transverse cable before the wheels touched the deck.

Even if Whiteway's patent with its catch (hook) and hinged support (rod) located as it was did not anticipate all the essentials of plaintiff's patent, as we believe it did, it is

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Opinion of the Court plain that by using Le Mesurier's rod and hook and attaching the rod where Whiteway's catch is attached to the plane, one has plaintiff's device. We see no invention in the combination of these two elements, even if we assume the originality of either or both of them in the minds of Le Mesurier and Whiteway. This is not a case where the combination of two or more anticipated devices produced a successful or greatly improved mechanism which displaced prior mechanisms in the trade and thus proved its originality. Compare Eibel Co. v. Paper Co., 261 U. S. 45; The Barbed Wire Patent, 143 U. S. 275. Here the proof shows that the supposed merit of plaintiff's invention, i. e., the slowing down of a plane while it is still in the air, in order to land it, has not been well regarded by the defendant and plaintiff has not shown that it had been adopted by others. The proof shows rather, as is brought out in our discussion of infringement, that so far as the defendant is concerned, the hook does not, if the landing is skillfully accomplished, engage the cable until after the plane has touched the deck, and if it does so engage it while the plane is a few inches off the deck just before touching it. the cable exerts no retarding force until after the wheels of the plane are rolling on the deck.

The universal joint as a device for attaching the rod to the melage was not invention. The device itself was well known and Ely had in 1911 (finding 26) and Le Mesurier, in 1918, a consideration of the control of the control of the control connections. Plaintiff has not pointed us to any substantial distinction between the pivot connection of his claims 7, 8, 9 11, and 128, and the universal connection of claim 13, and universal joint for the business 12 and 14. In claim 12, pivot and universal joint seem to be used by plaintiff as synonymous.

we now consider the question whether, assuming patentability, the defendant has infringed. The patent which we must assume is one for an airplane landing mechanism consisting of a movable rod with a hook attached either permanently to the rod, or to a cable, which hook may be so disposed by the pilot that it will engage a retarding device installed on the deck or other limited landing area while the blane is still in flight, and by exerting a roull mont the olane Opinion of the Court
in a direction approximately horizontal and in fore and aft
alinement with the center of gravity of the plane, retard it and
cause it to land.

The mechanism used by the defendant during the period inquisition consisted of a rol and hook statehed in the rear of and below the center of gravity of the plans, the rol excelling nearward and, when pulling, being inclinical downward to engage transverse cables stretched at right angles to the course of the plans, some fourteen inches (the approximate radius of the wheels of the plans) above the edset, each cable being so attached at its ends that no treatering force is applied until the hook draws the cable into the shape of a V present of the contraction of the cable before it was hooked.

The purpose of the mechanism was not to retard planes while in flight and thus cause them to descend to the landing deck, but to retard their forward progress after they had touched the deck. The construction of the mechanism was such as to reduce to a minimum the possibility of the plane being caught and retarded in flight, which was regarded by being caught and retarded in such which was regarded by that in every case if the plane had not already touched the deck when the hole, engaged, it would descend only a few inches farther before doing so, and the tension of the cables was such that no retarding force would be applied to retarding force would be applied to

plane until after its wheels were rolling on the deck.
When plaintiff in 1921 made his demonstration to the
defendant's officers, Commander (then Lieutenart) Stone
disapproved plaintiff's idea of hooking a plane while in
flight, saying it was dangerous. The proof shows that the
defendant's officers newer changed their riews in this regard.

It may be urged that even if the defendant did not desire to retard its planes while still in flight, and did not use irs mechanism to do so except by inadvertence or unsallifulness, yet the mechanism was an infringement because it was capable of so operating, and did, on coession, so operate. We do not think that the monopoly of a patent covers another derice, constructed in good faith to operate unou a viniciole General the Cert
different from that involved in and intended by the patent,
merely because it is impossible or impracticable to construct
the other device so that it can be operated without inattions of the control of the control of the control of the control
to boundaries of what might seen literally to be within
the patent. The purpose and the rad or supposed advantages of the patent have a bearing upon the scope of the
monopoly. If the accused infringer does not recognize as
an advantage the idea of the patent, avoids the use of the
site is the greatest extern possible, and does not in fact gain
posed boundary, he is not, in fact, an infringer because the
proper boundary of the patent can be extended to fact.

In the instant case, it would not be a proper application of the purpose of the patent laws to construe plaintiff's assumed patent for a device to retard the speed of a plane while still in flight so broadly as to prevent the development and use by others of a device to stop the roll of a plane after it has touched the landing surface. The two ideas are different. Indeed, plaintiff's asserted novelty lay only in the accomplishment of the former, since the latter was plainly anticipated. But because the whole problem arises out of the necessity for landing planes on a surface of limited area, and because the accomplishment of the feat is at best a hazardous one involving great skill, the defendant, desiring to retard the speed of the plane after it has touched the surface, should not be compelled, in order to avoid infringement, to waste a considerable amount of the limited landing area by locating its transverse cables so far forward on the deck that its planes will never engage one of the cables until after they have touched the landing surface.

We conclude that all of plaintiff's claims are invalid as having been anticipated, and that his claim to a device atteached in the rar of and so disposed as to exert a retarding force in approximate force and aft horizontal alimement with the center of gravity of the plane, in order to retard the speed of the plane while still in flight, was not infringed by the defendant.

The findings of fact, conclusion of law, and opinion heretofore filed are vacated and withdrawn, and new findings of fact, conclusion of law dismissing the petition, and this opinion are now filed. It is so ordered.

JONES. Judge: and WHALSY. Chief Justice, concur.

LITTLETON, Judge, concurs in the findings, and the opinion as to claim 1 of the patent, and dissents as to claims 2, 3, 9, and 12 to 16 inclusive.

Whitaker, Judge, took no part in the decision of this case.

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS v. THE UNITED STATES

[No. M-107. Decided March 2, 1942]

On the Proofs

Indian colour, exclusive as and occupancy, Irveity of July 39, 1883.
Where, in the treaty of July 30, 1883, between the North-western Bands of the Shoshnee Nation or Tribe of Boiltans and the United States, the development and one as said as and the Colour States, the development of the states and the property of the states of the state

Series and distincted to recover fix for a tracing for the United Section.

Series and distincted to recover fix for a tracing for the United Section.

Both, inserting a supervision of the series of the territory bands, inserting a complete and used all or a portion of the territory newberd in the Instant claims and their aborigation homes (and the recoved is held to be sufficient to show they did); it is held that pictured bands are not extend to recover, for the reasons of the series o

the treaty with said plaintiff bands."

Some.—Such a claim must be one that is within the terms of and supported by the provisions of the treaty; and aboriginal occurators and use is not such a claim.

Some; treaties of 1863; peace and smity.—The treaties made with the Shoehone Indians in 1883 were treaties of peace and amity, and it was not the intention of the Government to recognize, by said treaties, any exclusive wes and occupancy Reporter's Statement of the Case

title of the Indians to the lands which said Indians then occupied.

Some: Mexicus cession; status of indian lands—The question whether under the Mexicus laws at the time of the Mexicus cases of 1848 plaintiff bands had use and occupancy rights—that is, "Indian title"—to extend or the table instant case based upon aboriginal possession or occupancy, to the excution of the lands traviered in the case based upon aboriginal possession or occupancy, to the excutions of other Indian tritles, insee the other defedded versely to such contention in the decision of the Supresse Court in United States, or Currelian x, State Parcelle Mexicus.

road Co., 314 U. S. 339.

Bane: difficiency in expenditures of appropriated monache—Where, Following the artification of the treat of July 30, 1800, there of Standows and the same of 85,000 annually for 20 years at Standows In said ready; and where it appears from the standows and the said ready; and where it of the same of 85,000,17, was expended and differented by the deverment in mode and provisions for said Northwestern Banks; an interlecting where, maker this San of the centr, was entreed annually deverows; if any, in request to mid amount of

and the recovery of the money of the amount of officers if any applications of the amount of officers if any applications are applications of the amount of officers if any applications are applications and applications are applications are applications are applications and applications are applications and applications are applications and applications are applications are applications and applications are applications are applications and applications are applications are applications and applications are applications and applications are applications are applications and applications are applications and applications are applications are applications and applications are applications and applications are applications are applications are applications and applications are applications are applications and applications are applications are applications and applications are applications are applications are applications are applications are applications are applications and applications are applications are applications are applications and applications are applications are appl

The Reporter's statement of the case:

Mr. Ernest L. Wilkinson and Mr. Herman J. Galloway for the plaintiffs. Mr. Joseph Ches, Mr. Charles J. Kappler, Mr. Frank K. Nebeker, and Mr. Clinton D. Vernon were on the brief.

Mr. George T. Stormont, with whom was Mr. Assistant Attorney General Norman M. Littell, for the defendant. Mr. Raymond T. Naule was on the brief.

In the petition plaintiff bands of the Shoshone tribe seek to recover \$15,000,000 for the alleged unlawful taking of their lands, aggregating 15,643,000 acres, in alleged violation of a treaty of July 30, 1863, and \$70,000 of the treaty annotities of \$5,000 per annum for twenty years which it is

Reporter's Statement of the Care alleged the Government failed to furnish in goods and provisions as agreed.

Defendant contends that the treaty of July 30, 1863, with plaintiff bands was a treaty of peace and amity and that it did not recognize, acknowledge, or concede as against the sovereign an exclusive use and occupancy right or title of the Indians; that the United States did not at that time recognize or has it ever recognized an exclusive right of occupancy in plaintiff bands to the whole or any part of the territory now claimed by them, but that it has ever exercised

dominion and complete ownership over it. Defendant further contends with reference to the annuity provisions of the treaty that if there was any deficiency in the furnishing of the annuity goods provided therein, such deficiency did not exceed \$10,804,17.

The court, having made the foregoing introductory statement, entered special findings of fact as follows: 1. Plaintiff bands of Shoshone Indians were in 1863 and prior thereto a part of about fourteen bands of the Shoshone nation or tribe of Indians located in the territories of Washington and Utah. The area inhabited and occupied by the Shoshone nation or tribe of Indians became a part of the states of Wyoming, Colorado, Utah, Idaho, and Nevada. For convenience the officials and agents of the United States having charge of Indian affairs designated and referred to the plaintiff Indians of the Shoshone tribe as the "Northwestern" bands of the Shoshone Indians in their correspondence, reports, and treaties. The Shoshone nation, or tribe, itself had no such recognized division. The Shoshone tribe of Indians with its affiliated hands of Bannock Indians and a number of individual Indians of other friendly tribes, who had extensively intermarried among the Shoshones and lived with them, rosmed over, occupied, and used as their home a vast area approximating 80,825,000 acres. During and prior to 1863 the Shoshone Tribe of Indians and the affiliated bands of Bannocks, from time immemorial, roamed over, lived upon, occupied, and used a territory of the approximate area above mentioned as their home and for their support and livelihood, by hunting and general control of the contr

beadens.

2. The territory for which compensation is claimed by plaintiff bands of the Shoohone tribs as for a taking by the United States of their use and occupancy title, which interest they claim was recognized and acknowledged by the United States in a treaty of July 30, 1883, consists of 15,693,000 acres of land of which 6,697,000 acres are bouted in the southeastern part of Idaho, 688,000 acres in the acceptance of United Indian Compensation of the Compens

ous bands, each having a chief and various subchiefs or

population of plaintiff hands in 1385 was between 1,000 and 1,500.

3. In 1500, and prior thereto, practically nothing was known by the Government with reference to the Indians inhabiting the region which became southern Ishdo, eastern Googen, northern Nevalus and nothern Utah, and little, if surphing, was definitely known of the tribal distinctions of the principle of the priority of the priority of the tribal or hands. The Indians of this region were demoninated as Shodows-Sankes, and Diverse, or Paisters.

tribes or bands. The Indians of this region were denominated as Shoshones, Snakes, and Diggers, or Paiutes. The Indians of the Shoshone and Bannock tribes have always shown an attitude and desire to be peaceful and

always shown an attitude and desire to be peaceful and friendly to the whites and to the Government. Washakie, principal chief of the Shoshone tribe, and the majority of

Reporter's Statement of the Case all the Shoshone Indians of that tribe have been friendly at all times with the white people and with the Government of the United States. The Shoshone tribe, as such, has never at any time engaged in war with the United States. Between 1849 and 1863 some of the Shoshone Indians of the Northwestern Bands caused the emigrants, settlers, and the Government considerable trouble by depredations and warlike acts due to the driving away of game and the destruction of their only source of food supply. Following the advent of the Mormons into Utah, their spread into arable valleys in the southeastern corner of Idaho and the establishment of overland trails to California and Oregon and to the mining regions of Idaho and Montana through the country inhabited by the Shoshone Indians, trouble between some of the Indians and the emigrants and settlers arose. This was due to the driving away by the emigrants and white settlers of the sparse game supply of the Indians and the destruction of the equally sparse supplies of grass and timber from which the Indians also obtained a considerable portion of their livelihood in the form of roots. berries, and nuts, thus causing the Shoshone Indians, especially those located in south central Idaho, northeastern Nevada, and northwestern Utah to be reduced to a condition of practical starvation, rendering it necessary for them to "steal or starve." The Commissioner of Indian Affairs in his annual report for the fiscal year ending June 30, 1859, stated in part as follows:

The reports of the condition of the Indians in Unia present a malactory pictors. The white are in possession of most of the little comparatively good country to a second control of the little comparatively good country to fine reduced to the greatest straits, particularly in the winter, which is sever in that repton, and when it is no thirt, which is sever in that repton, and when it is no Even at other seasons, numbers of them are compelled to sustain life by using for food reptice, insuets, grass seel, and roots. Several farms have been opened for the property of the comparative of the control of the have manifested a disposition to all in their cultivation, but, unfortunately, most of the crops were this year destroyed by the grasslopper and other insects. Many

Reporter's Statement of the Case of the numerous depredations upon the emigrants have, doubtless, been committed by them in consequence of their destitute and desperate condition. They have at times been compelled to either steal or starve; but there is reason to be apprehended that in their forays they have often been only the tools of the lawless whites residing in the Territory. In some of the worst outrages of this kind, involving the lives as well as the property of our emigrants, the latter are known to have participated. \* \* \*

The Superintendent of Indian Affairs for the Utah Territory in his annual report of October 1, 1861, to the Commissioner of Indian Affairs stated:

Too little attention, I am fearful, has heretofore been paid to the fact that there is very little game in this Territory, of any description, which the Indians can kill to keep them in food. There is no buffalo whatever that range in this Territory, and very few antelope, elk, deer, mountain sheep, or bear, and these only in certain localities. Civilization seems to have had the same effect here as has been noticed elsewhere in this country since the

first settlement by our forefathers, in driving before it the game natural to a wilderness, and the Indians complain bitterly that since the white man has come among them their game has almost entirely disappeared from their former hunting grounds, and they are now obliged either to beg food from the white settlers or starve.

The driving away of the buffalo not only deprives them of their principal supply of food, but also of a great source of revenue and comfort in the skins, which they sold and used to keep them comfortable in cold weather.

I have had more applications from Indians for beef and flour since I have been here than anything else. They frequently come to me and fairly beg for some beef, to keep their squaws and papooses from starving.

Owing to the limited amount of money placed in my hands, I have been unable to entirely satisfy their demands, but I am confident that what I have distributed in that way has been a great deal more satisfactory to the Indians than three times the amount expended in any kind of trinkets usually disbursed by the department would have been.

Reporter's Statement of the Case The annual appropriation for this superintendency has, in my opinion, always been too small to allow the superintendent and agents to give that satisfaction to the Indians which their wants demand, and a proper regard for the rights and safety of the white settlers, by preventing depredations, requires.

The establishment of the overland daily mail and telegraph lines, and their recent completion through this Territory-consummations of such vital importance to the people throughout the Union-renders it necessary that steps should be immediately taken by the government to prevent the possibility of their being interrupted by the Indians.

On this subject I have taken much pains to consult with most of the leading men connected with these great enterprises, and also with nearly all of the head chiefs of the Indians that range on their lines in this Territory, and have, after mature deliberation, come to the conclusion that the only manner in which this can be effected to the entire satisfaction and protection of all the parties concerned, is by a treaty between the United States and the tribes of Indians ranging in this superintendency. In recent consultations or "talks" with the Wash-a-

kee and Sho-kub, the head chiefs of the Shoshones or Snake Indians, Navacoots and Pe-tut-neet, chiefs of the Ute nation, and many of the sub-chiefs of both nations, I find that they are unanimously in favor of a treaty with the United States, and agree with me in considering that to be the only effectual way to check the stealing propensities of some of their Indians; and from information gleaned from them on various occasions, I have made the following memorandum in regard to the probable cost and effect of a treaty.

They express their willingness to cede to the United States all the lands they claim in this Territory, with the exception of reservations necessary for their homes: and ask, in return, that the United States shall make them annual presents of blankets, beads, paint, calico, ammunition, &c., with occasional supplies of heef and flour sufficient to make them comfortable, which I estimate can be done with a small addition to the usual appropriation. .

I cannot too strongly recommend this course to the department, and sincerely hope that it will meet with 42 Reporter's Statement of the Case

that prompt attention that, to my mind, the importance of the subject entitles it.

4. In and prior to 1850, and for several years subsequent thereto, the Government was doing practically nothing for these Indians in the way of providing them with food or supplies. The Indian agents and superintendents in the territory inhabited by the Shoshone Indians frequently went among these Indians, especially those inhabiting the routes of western travel, for the purpose of endeavoring to preserve peace and, to that end, gave the Indians along these routes of travel such presents as they were able to provide, which presents were gratefully received by the Indians. All the Indians encountered by these officials as far west as central Nevada and Salmon Falls on the Shoshone River in Idaho professed friendship for the white people and the Government and showed a real desire for peace: they begged of the Government officers provisions and supplies from the Government because of the destruction of their only means of livelihood. As a result of the conditions mentioned, certain Indians of the Northwestern Bands of the Shoshones banded together and made attacks and committed depredations from time to time upon emigrant trains. The conduct of certain unscrupulous white men accravated and encouraged these attacks and depredations. Because of these conditions and with the desire to prevent or to ameliorate them, the United States' agents and superintendents of Indian affairs in that territory constantly made recommendations that the Government make some provision to furnish them with means of aiding the Indians, by furnishing them with food and supplies which would have the effect of bringing about peace and friendship among the Indiana They also recommended that a treaty be entered into with the Shoshone Indians which would provide for care of the Indians and the safety of the emigrants and settlers. These officers were positive in their assertions that this would bring about a condition of permanent peace and friendship with the Indians, because they had found that all the Shoshone Indians with whom they had come in contact in their travels sincerely desired peace. The Commissioner of Indian Affairs and the Secretary of Interior in their annual reports to Congress from 1896 forward made similar recommendations to the Congress. However, it was not until 1896 that however, it was not until 1896 that the Land of the Land of the the Aet of July 5, 1899, 18 Stat. 510, 1890, being an act making appropriations for the current and for fulfilling treaty subpartitions with various other Indian tribes, the Congress appropriated 80,000 offor detraying the expenses of or goodating a treaty with the Shoelsoness or States Indians, or the direction of the Secretary of the Interior.

On February 26, 1862, prior to the passage of the appropriation act of July 5, the Secretary of the Interior wrote the chairman of the House Committee of Indian Affairs in part as follows:

The Acting Commissioner of Indian Affairs has submitted to this Department a resolution of the House of Reps of the 30th ult", instructing your Committee to "inquire into the expediency of making an appropriate in the submittee of the submittee

unfit for cultivation, and it is not probable that any considerable portion of them will be required for settlement for many years. The principal inducement to make treaties with those tribes is the control which the Government would thereby be enabled to exercise over them, by which additional security would be given to seem to be a second of the control with a second Telegraph Lines. How far it will be proper to incur excesses with a

How far it will be proper to incur expense with a view to this obejct, is a matter which must be confided to the judgment of Congress,

5. Pursuant to the appropriation act of July 5, the President appointed a special commission consisting of James Duane Doty, Superintendent of Indian Affairs for the Territory of Utah Later Governor of that Territory, Luthers.

Mann, Indian agent in the same Territory, and Henry Martin, a former superintendent of Indian Affairs for Utah Territory. The Siniture of Commissioner Martin to reach Utah with provisions and presents in time to meet the Indians before odd weather set in delayed negatiations and the Indians before odd weather set in delayed negatiations. Which is the Indians before odd weather set in delayed negatiations. Which is the Indians before out of the Indians before out of the Indians to Indians the Indians of Indians o

6. On July 22, 1862, the Commissioner of Indian Affairs gave Commissioners Doty, Mann, and Martin a letter of instructions as follows:

Congress at its recent Session having appropriated Toward Thomand Dollars for the purpose of making a Toward Thomand Dollars for the purpose of making a toward toward toward toward toward toward toward object of the said appropriation. No milliciant speaks object of the said appropriation. No milliciant speaks able me to state definitely the boundaries of the country instabled and claimable by these Indians, but it is undertable to taste definitely the boundaries of the country instabled and claimable by these Indians, but it is undertable to the country of the country of the country of Usha and eastern portion of Washington Territories, through which list the count of the overland mail, and Territory and it is mainly to secure the safety of the travel along these routes that a terry it indistrible.

with a view to the extinguishment of the Indian title to the land, but it is believed that with the assurances you are authorized to make of the amicable relations which the United States desires to establish and perpetuate with them, and by the payment of Twenty thousand dollars of annuities in such articles as by the President may be deemed suitable to their wants for which you are authorized to stipulate, you will be enabled to procure from them such articles of agreement as will render the routes indicated secure for travel and free from molestation; also a definite acknowledgment as well of the boundaries of the entire country they claim, as of the limits within which they will confine themselves, which limits it is hardly necessary to state should be as remote from said routes as practicable.

It must however be borne in mind that in stipulating for the payment of annuities the sum mentioned above is not to be exceeded, so that if for any reason, you are unable to treat with all the bands of the Shoshoness, the amount of annuities stipulated to be paid must be such a proportion of said sum as the number of the bands treated with bears to the number of the entire nation.

Is will also be well so to frame the treaty that while on the one hand it is expressed that the United States being sware of the inconvenience resulting to the Indians in consequence of the driving sway and destruction of the same of the control of the Indians of the Indians of the State States willing to fairly compensate them for the same, the Indians on the other hand shall acknowledge the reception of the annuties stipulated for, as a full equivalent therefor, and shall plode, themselves at all times beweither to refrain from depreciations and maintains beweither to refrain from depreciation and maintains the state of the same of the Indians of the India

Should you find it impracticable to make one treaty which will secure the good will and friendship of all the tribes or bands of Shoshones Indians, you will then negotiate only with that tribe or band which is most dangerous to emigrants and settlers upon the route of travel to the Pacific, which has the largest amount of a travel to the Pacific, which has the largest amount of mails is an important object, yet it is less important than the preservation of the lives of the emigrants.

If therefore you shall find it impracticable with the means at your disposal to make a treaty which shall afford complete protection to the route of travel over route of travel over more than the protection of the control of the protection for one of said routes, you will negotiate a treaty with such trike or bands as will secure that protection to the route over which the largest amount of travels and emigration passes without reference to of travels and emigration passes without reference to

I have to direct that you arrange the times and places of your councils with the Indians that so far as practicable the entire nation shall be represented, which it is presumed the amount appropriated will with proper economy enable you to very nearly if not completely accomplish.

Mr. Martin, one of your Commissioners having filed the necessary bond, has been entrusted with the funds and will make all such arrangements for the purchase of goods and disbursement of money as may be necessary. The present of the trady commissioners to be trady to the inability of the trady commissioners to be trady to the inability of the trady commission of meeting and negotiath performance of their mission of meeting and negotiath performance of the meeting and adjusted and the present the meeting and adjusted and the meeting and adjusted and the state of the Shoohone Indiana during the winter of 1800–1808 with the result that in January 1808 Colonel Commer, commanding the Military District of Tudak winter of 1800–1808 with the result and the state of the state

 June 1, 1863, the Commissioner of Indian Affairs wrote to Mr. Doty, Superintendent of Indian Affairs for the Territory of Utah and chairman of the Treaty commissioners, as follows:

I have to acknowledge the receipt of your letter of 30th March last in relation to the proposed Treaty with the Shoshonees.

I exceedingly regret that unforessen circumstances have combined to cause so much delay in the attempt to effect the contemptated negotiations. From the in-February last I had reason to approach that find would be at the disposal of yourself and Agent Mann so that council with the Indians could be held early in the Spring. In this however I was disappointed as late of the council with the Indians could be held early in the Spring. In this however I was disappointed as late of the Indian sould be at the support of the Indian sould be at the support of the Indian sould be at Indian so

An answer to your letter has been delayed some days with a view to consulting with Gov. Ney (who has been with a view to consulting with Gov. Ney who has been the place I have to inform you that the balance of the funds returned by late Agent Martin amounting to which the standard of t

Agent Martin having wholly failed in accomplishing the object of his appointment, the negotiation will 449073—42—CC—vol. 95—43

Reporter's Statement of the Care henceforth be confided to you and Agent Mann under the instructions heretofore issued, unless it shall be found practicable, and in your judgment expedient to associate with you Gov. Nye of Nevada and Gov. Wallace of the New Territory of Idaho in addition to Agent Mann, in which event you will be authorized to do so, but I suggest that no great delay, nor any considerable expense should be incurred for the purpose. In regard to the suggestions of your letter of 27th Nov. last in relation to the necessity of treaties with the Utahs and Bannucks I have to state that you are authorized to make a joint treaty with these tribes and the Shoshones if one can be negotiated with the funds appropriated for the purpose of treating with the latter and now at your disposal. While I do not

hesitate in view of the urgent necessities of the case and the weighty reasons therefor suggested by you to divert the specific application of the appropriation to the extent indicated, I do not feel warranted in attempting a negotiation with the Utahs and Bannucks in advance of an appropriation, unless it shall be found practicable to accomplish it as above indicated, In view of the limited amount of the appropriation it is exceedingly vexatious that so much thereof should

have been expended by late Agent Martin to so little purpose and that the necessity for the exercise of the strictest economy should thereby be enhanced to so great an extent. I have however full confidence that whatever is practicable will be accomplished by yourself and those who may be associated with you.

Trusting that I may receive an early and favorable report from you I remain On June 20, 1863, Commissioner Doty wrote the Com-

missioner of Indian Affairs as follows:

I have the honor to acknowledge the receipt of your letter, dated May 22, 1863, in relation to my northern expedition, and to report:

That I returned to this city from that expedition on the 19th instant, having been absent six weeks in the Indian country, and travelled over eight hundred miles. I accompanied General Conner to Snake River Ferry, two hundred miles, where we separated, and he proceeded with his cavalry up the Blackfoot river, and south across the dividing ridge to Soda Springs, at which he has established a military post, on the old California and Oregon roads. The Bannacks and Shocontrol of the control of the contro

When at Snake River ferry, two express-men arrived, bringing information that a large body of Shoshonees and Bannacks were assembled at Kamash prairie, about one hundred miles further north, on the road used by emigrants to Bannack city, with the intention to either fall upon the miners on Beaver Head and its branches, or upon the emigrants along the road between South Pass and Bridger. If this could be prevented by an interview. I felt it my duty to make the attempt, and therefore proceeded with my interpreter to the place indicated to meet them. At Kamash prairie I found but few Indians-those remaining stating that those who had been there had gone in different directions to the mountains to hunt, and that they were all friendly to the whites, and disposed to be neaceable. They complained of the white men at Bannack city firing upon them in the streets of that place, when they were there upon a friendly visit, and molesting no one, and killed their chief, Shanog, and two others. They said they did not intend to revence this wanton act, because it was committed by men who were drunk, and they thought all the people there were drunk at the time. I advised them not to go there again, and to keep away from drunken white men; to be kind, and render good service to the emigrants along the road, and that they would be generously rewarded. I gave them a few presents of blankets, &c. However, fearing there might be trouble from this gross attack, and that other bands might not be disposed to overlook it. I determined, as there was no Indian agent in this section of country, to proceed to Bannack city, about eighty miles distant, to ascertain the truth of their statement, and to counsel with those who might be along the road through the mountains. On entering the mountains I encountered

95 C. Cla Reporter's Statement of the Case a large band of Shoshonees, who manifested a friendly spirit, expressed a desire to be at peace, and thankfully accepted the few presents I was able to make them. On arriving at Bannack I learned with regret that the statement by the Indians of the murder of their people was true; that they were fired upon as they were sitting quietly in the street, by a dozen white men, and that their sole object in visiting the place was to give up a child-which they did-which had been demanded of them on the supposition that it was a stolen white child. I saw the child, and have no doubt that it is a halfbreed, and was rightfully in their possession. I would have adopted legal measures for the punishment of these offenders, but there were no civil officers there, and no laws but such as have been adopted by miners. The

no laws out some an wish near adopted on miches. In ment of Idaho.

Whilst at Bannach, beorethyned that bone of Firement of Idaho.

Whilst at Bannach, beorethyned that bone of Firethyness of the Bannach, beorethyness, but the second of the Bannaches and Shenboness, for the purpose of stealing their horses and making war upon them. Dempeys an accellent interpret, to send guide and guard of Indians with me. These accompanied me faithfully to the settlement of the Eiler, and will, on the third of the settlement of the Eiler, and will, on

their nation they meet.

All the Indians I met, during my absence, appeared desirous to form a treaty with the United States, and I told them that when the commissioners were ready to meet them I would send a runner to them to inform them of the time and place for them to assemble.

On the same date Commissioner Doty wrote to the Commissioner of Indian Affairs another letter as follows:

Your letter of instructions in relation to the proposed treaty with the Schodones, dated June 1, 1983, I have the honor to acknowledge, and to inform you that I shall proceed the coming week to fort Bridger for the purpose of meeting the Shoshonese who are assembled there, some of whom I met on my late expedition, and of treating with them according to your instructions of the 22d of 21ut, 1869, and of those now give

Many of these Indians have been hostile, and have committed depredations upon the persons and property of emigrants and settlers, but now express a strong desire for peace. Agent Mann informs me that he is Reperter's Statement of the Case now feeding them under your authority; I therefore

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now feeding them under your authority; I therefore hasten to meet them, that some arrangement may be made by which they can with satisfaction return to their hunting grounds, and upon terms which shall secure peace hereafter, eafety to the emigrants and travellers, and relieve the department from the expense now being

These are about one-third of the Shoshones with whom treaties may be held, and I shall endeavor to limit the expenditures to the least amount to obtain the objects desired by government.

The Shoshones Bands are scattered over so vast an extent of country that it will be necessary for the commissioners to meet them at several points. The whole nation can never be assembled without bringing them hundreds of miles.

9. Following June 20, 1883, the Governments treaty commissioners met with the Shoehone Tribe of Indians and the Dannock bands in groups at different points and on different metallicity of the state of the state

### Rastern Shoshone Treaty

Articles of Agreement made at Fort Bridger, in Utah Territory, this 2d day of July, A. D. 1883, by Utah Detween the United States of America, represented by its Commissioners, and the Shoshone Nation of Indians, represented by its Chiefs and Principal Men and Warriors of the Eastern Bands, as follows:

#### Article I

Friendly and amicable relations are hereby reestablished between the bands of the Shoshonee nation, partice hereto, and the United States; and it is declared that a firm and perpetual peace shall be heneforth maintained between the Shoshonee nation and tha United States.

# Reporter's Statement of the Case

# Article II

95 C. Cla.

The several routes of travel through the Shoshonee country, now or hereafter used by white men, shall be and remain forever free and safe for the use of the government of the United States, and of all emigrants and travellers under its authority and protection, without molestation or injury from any of the people of said nation. And if depredations should at any time be committed by bad men of their nation, the offenders shall be immediately seized and delivered up to the proper officers of the United States, to be punished as their offences shall deserve; and the safety of all travellers passing peaceably over said routes is hereby guaranteed by said nation. Military agricultural settlements and military posts may be established by the President of the United States along said routes; ferries may be maintained over the rivers wherever they may be required; and houses erected and settlements formed at such points as may be necessary for the comfort and convenience of travellers.

### Article III

The telegraph and overland stage lines having been established and operated through a part of the Shoshones country, it is expressly agreed that the same may be continued without hindrance, molessation, or injury from the people of said nation, and that their property, and the lives of passengers in the stages, and of the employees of the respective companies, shall be protected by them.

And further, it being understood that provision has been made by the Government of the United States for the construction of a railway from the plains west to the Pacific ocean, it is stipulated by said nation that said railway, or its branches, may be located, constructed, and operated, without molestation from them, through any portion of the country claimed by them.

## Article IV

It is understood the boundaries of the Shoshonee country, as defined and described by said nation, is as follows: On the north, by the mountains on the north side of the valley of Shoshonee or Snake River; on the east, by the Wind River mountains, Peenahpah river, the north fork of Platte or Koo-chinagah, and the north Park or Buffale House; and on

Reporter's Statement of the Gase the south, by Yampah river and the Unitah mountains. The western boundary is left undefined, there being no Shoehonese from that district of country present, but the bands now present claim that their own country is bounded on the west by Salt Lake.

### Article V

The United States being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by whites, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceding stipulations, the United States promise and agree to pay to the bands of the Shoshonee nation. parties hereto, annually for the term of twenty years. the sum of ten thousand dollars, in such articles as the President of the United States may deem suitable to their wants and condition, either as hunters or herdsmen. And the said bands of the Shoshonee nation hereby acknowledge the reception of the said stipulated annuities, as a full compensation and equivalent for the loss of game, and the rights and privileges hereby conceded.

### Article VI

The said bands hereby acknowledge that they have received from said Commissioners provisions and clothing amounting to six thousand dollars, as presents, at the conclusion of this treaty.

This treaty was designated by the commissioners as an agreement with the "Bastem Bands" of the Shenhoes Nation of Indians for the reason that the bands of Indians present and participating bettern were located in the estern portion of the territory inhabited or eccupied by the Indians of the Shenhoes Nation. F. Bridger, the place where the treaty was made, was located mear the southwestern corner of Wyouling, east of the Purosend range of montains. This Wyouling, east of the Purosend range of montains of the Admin by the treaty commissioner with a latter of 24th y S. 88. as follows:

We have the honor to transmit herewith a Treaty which we concluded yesterday with the Shoshonee

Reporter's Statement of the Case nation, which we hope will be approved by the Department. The terms were more advantageous than we had

expected to obtain.

The representation of the nation was very large, being from all the bands of the nation except four. The parties treating occupy the whole of the country east of—and including—Salt Lake valley. The two principal chiefs of the nation, Washakee and Wanapitz. were present.

One of these absent Bands is in Ruby valley and on the Humboldt mountains and river. The other three continue their hostilities, but are now much reduced in numbers, and have been driven by the Troops north to the valley of Snake river. We may now perhaps be able to get messengers to them, and induce them to treat with us for peace.

The amount expended in making this Treaty, is about six thousand dollars; the account, with the vouchers, will be forwarded without delay. There was near one thousand Shoshonees-and no Bannacks or Utahs-on the ground. They have been fed, according to your instructions, for the past month, which has somewhat increased the expenditure of the Treaty fund, to which it is charged.

10. Thereafter, on July 30, the treaty commissioners assembled at Box Elder, in Utah Territory, and met with plaintiff bands of the Shoshone nation or tribe which inhabited and occupied the territory west of the range of mountains above mentioned and the territory occupied and possessed by Chief Washakie and the bands with whom the treaty of July 2 had been made. The commissioners there made a treaty which was signed on behalf of these Indians by Pocatello, chief of one of the bands, and eight chiefs of other bands of the Shoshone tribe. Pocatello was regarded as the principal chief under Washakie of this group of bands. These Indians were designated by the treaty commissioners and by the treaty entered into as the "Northwestern Bands" of Shoshone Indians. This treaty (18 Stat. 663) was as follows:

## Northwestern Shoshone Treaty

Articles of agreement made at Box Elder, in Utah Territory, this 30th day of July, A. D., 1863, by and between the United States of America, represented by Brigadier General P. Edward Connor, commanding the military district of Utah, and James Duane Doty, commissioner, and the northwestern bands of the Shoshonee Indians, represented by their chiefs and warriors.

ARTICLE I. It is agreed that friendly and amicable relations shall be reestablished between the bands of the Shoshonee Nation, parties hereto, and the United States, and it is declared that a firm and perpetual peace shall be henceforth maintained between the said bands and the United States.

ARTICAL II. The treaty concluded at Fort Bridger on the Only of July 1985, between the United States and the Shocknese Nation, being read and fully interpreted and explained to the said chiefs and warriors, they do hereby give their full and free usesent to all of the provisions of said treaty, and the same are hereby adopted as a part of this agreement, and the same shall be binding upon the ARTICAL III. In consideration of the stirulations in the

preceding articles, the United States agree to increase the annuity to the Shochonee Nation five thousand dollars, to be paid in the manner provided in said treaty. And the said northwestern bands hereby acknowledge to have received of the United States, at the signing of these articles, provisions and goods to the amount of two thousand dollars, to relieve their immediate necessities, the said bands having

been reduced by the war to a state of utter destitution.

ARTICLE IV. The country claimed by Pokatello, for himself and his people, is bounded on the west by Raft River and on the east by the Porteneut Mountains.

This treaty was transmitted by the treaty commissioners with a letter of July 30, 1863, from Commissioner Doty to the Commissioner of Indian Affairs, as follows:

A treaty of peace was this day concluded at this place by General Councer and myself with the bands of the Shoshones, of which Pocatello, San Pitch, (Sanpitz), and Sagwich are the principal chiefs. This information is given that these Shoshones may not be injured when met by the troops, if they are at the time behaving Reserver's Extensive the Case themselves well. A treaty of peace has also been entered into at Fort Bridger with other bands of the Shoshones, and it is understood that all of that nation are at peace with the United States and are under a pledge to remain friendly.

II. Thereafter on October 1, 1863, the commissioners assembled and met with the bands of the Stohelone Nation of Indians at Ruby Valley in what is now northeastern Newada, which Indians occupied and possessed an area of country in the northeastern portion of the territory of Newada, and there entered into a treaty with those bands with a letter of July 30, 1863, from Commissioner Doty to the Commissioner of Indian Affairs as follows:

# Western Shoshone Treaty

Treaty of Peace and Friendship made at Ruby Valley, in the Territory of Nevada, this 1st day of October, A. D., 1863, between the United States of America, represented by the undersigned commissioners, and the Western Bands of the Shoeshonce Nation of Indians, represented by their Chiefs, and Principal Men and Warriors, as follows:

#### Article I

Peace and friendship shall be hereafter established and maintained between the Western Bands of the Shehonen ention and the people and Government of the United States; and the said bands stipulate and agree that bostlitites and all depredations upon the enigrant trains, the mail and telegraph lines, and putthe ottizens of the United States within their country,

### Article II

The several routes of travel through the Shodomes country, now on breafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States, and of all emigrants and travelers under its authority and protection, without molestation or injury from them. but men of their nation, the offenders shall be immediately taken and delivered up to the proper officers Reporter's Statement of the Case of the United States, to be punished as their offences

shall deserve; and the safety of all travelers passing

peaceably over either of said routes is hereby guaran-

tied by said bands,

Military posts may be established by the President of the United States along said routes or elsewhere in their country; and station houses may be erected and occupied at such points as may be necessary for the comfort and convenience of travelers or for mail or telegraph companies.

#### Article III

The telegraph and overland stage lines having been established and operated by companies under the authority of the United States through a part of the Shoshonee country, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said bands, and that their property and the lives and property of passengers in the stages and of the employes of the respective companies, shall be protected by them. And further, it being understood that provision has been made by the government of the United States for the construction of a railway from the plains west to the Pacific ocean it is stipulated by the said bands that the said railway or its branches may be located, constructed, and operated, and without molestation from them, through any portion of the country claimed or occupied by them,

# Article TV

It is further agreed by the parties hereto, that the Shoshones country may be explored and prospected for gold and silver, or other miterals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established whenever they may be required. Mills may be erected and timber taken for their use, as also for building or other proposes in any part of the country claimed by

### Article V

It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:

On the north by Wong-goga-da Mountains and Shoshonee River Valley; on the west by Su-non-to-yah Repetic's Statement of the Case
Mountains or Smith Creek Mountains; on the south
by Wi-co-bah and the Colorado Desert; on the east by
Po-ho-no-be Valley or Steptoe Valley and Great Saft
Lake Valley.

## Article VI

The said bands agree that whenever the President of the United States shall doem it expedient for them to abandon the reaming life, which they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described, and they do also hereby agree to remove their contractions of the property of t

### Article VII

The United States, being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes traveled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceding stipulations, and of their faithful observance by the said bands, the United States promise and agree to pay to the said bands of the Shoshones nation parties hereto, annually for the term of twenty years, the sum of five thousand dollars in such articles, including cattle for herding or other purposes, as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsmen. And the said bands hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded.

# Article VIII

The said bands hereby acknowledge that they have received from said commissioners provisions and clothing amounting to five thousand dollars as presents at the conclusion of this treaty.

12. Thereafter, on October 12, 1863, the treaty commissioners assembled and met with the Shoshones-Goship Bands of Indians balonging to and affiliated with the Shoshone

Reporter's Statement of the Case Nation of Indians at Tuilla Valley, just south of Great Salt Lake in what is now the northeastern portion of Utah. These bands of Indians occupied a territory lying in western Utah and eastern Nevada, south of Salt Lake and south of the territory occupied by the Northwestern Bands and east of that occupied by the Western Bands of Shoshones. This treaty (13 Stat. 681) was as follows:

### Shoshonee-Goship Treaty

Treaty of peace and friendship made at Tuilla Valley, in the Territory of Utsh, this 12th day of October, A. D. 1863, between the United States of America, represented by the undersigned commissioners, and the Shoshonee-Goship bands of Indians, represented by their chiefs, principal men, and warriors, as follows:

ARTICLE I. Peace and friendship is hereby established and shall be hereafter maintained between the Shoshonee-Goship bands of Indians and the citizens and Government of the United States; and the said bands stipulate and agree that hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States, within their country, shall cease.

ARTICLE II. It is further stipulated by said bands that the several routes of travel through their country now or hereafter used by white men shall be forever free and unobstructed by them, for the use of the Govern-ment of the United States, and of all emigrants and travellers within it under its authority and protection, without molestation or injury from them. And if depredations are at any time committed by bad men of their own or other tribes within their country, the offenders shall be immediately taken and delivered up to the proper officers of the United States, to be punished as their offences may deserve; and the safety of all travellers passing peaceably over either of said

routes is hereby guaranteed by said bands. Military posts may be established by the President of the United States along said routes, or elsewhere in their country; and station-houses may be erected and occupied at such points as may be necessary for the comfort and convenience of travellers or for the use of the mail or telegraph companies.

Arricas III. The telegraph and overland stage lines having been established and operated by companies under the authority of the United States through the country occupied by said bands, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said bands, and that their property, and the lives and property

of passengers in the stages, and of the employees of the respective companies, shall be protected by them. And further, it being understood that provision has been made by the Government of the United States for the construction of a railway from the plains west to the Pacific Cosan, it is stipulated by said bands that to the Pacific Cosan, it is stipulated by said bands that structed, and operated, and without molestation from them, through any portion of the country claimed or

occupied by them.

AHTCLE IV. It is further agreed by the parties hersto
that the country of the Goship tribe may be explored
that the country of the Goship tribe may be explored
and metals; and when mines are discovered they may
be worked, and mining and agricultural settlements
formed and ranches established wherever they may be
required. Mills may be erecked and timber taken for
any part of gaid country. Mills and other purposes, in
any part of gaid country.

Africar V. It is understood that the boundaries of the country claimed and occupied by the Goship tribe, as defined and described by said bands, are as follows: On the north by the middle of the Great Desert; on the west by Steptoe Valley; on the south by Tococko or Green Mountains; and on the east by Great Sait Lake, Tuills, and Rush Valleys.

America VI. To such bands agree that whenever the America VI. To such States shall deam it expedient for them of the such as t

Arricax VII. The United States being aware of the inconvenience resulting to the Indians, in consequence of the driving away and destruction of game along the routes travelled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same. Therefore, and in consideration of the preceding stipulations, and of

her interest in the state of the state of the state of the state promise and agree to pay to the said Goship of the President of the President of the United States promise and agree to pay to the said Goship of the President of the United States, annually, fee the term of twenty years, the sum of one thousand over the president of the state of the state

13. Thereafter, on October 14, 1863, the treaty commissioners assembled and met at 8 ods. Springs, in what is now eastern Idaho, with certain bands of Bannocks and Sho-shone Indians designated by the treaty commissioners as "the mixed bands of Bannocks and Shootnones," and extend into a treaty with them, which treaty was signed by thirteen chiefs of these bands. This treaty (5 Kapp. 698) was as follows:

#### Mixed Rands Treaty

Treaty of peace and friendship, made at Soda Springs, in Idaho Territory, this 14th day of October A. D., 1883, by and between the United States of America, represented by Brigadier General P. Edward Connor, commanding the military district of Utah, &c., and James Duane Dotty, commissioner, and the undersigned chiefs of the mixed bands of Bannacks and the Connect of the Control of the Control

### Article I

It is mutually agreed that friendly and amicable relations shall be reestablished between the said Bands and the United States, and that a firm and perpetual peace shall be henceforth maintained between the said bands and the United States.

# Article II

The treaty concluded at Fort Bridger, on the second day of July, 1863, between the United States and the Bheshouse and the Cart State Cart

### Article III

The said bods, in difficont, see that his reads nor used by white new lovens 5,60 Springs and the Beaver Head mines, and between 5,84 Lake and the Beaver Head mines, and between 5,84 Lake and the Beaver Head mines, and so such darker roads as it may within their country, shall at all time be free and after within their country, shall at all time be free and after the second of the second to the second to

# Article IV

The country claimed by the said bands jointly with the Shoshonee nation, extends, as described by them, from the lower part of Humboldt river and the Saimon Falls, on Shoshonee river, easterly to the Wind River mountains.

14. On August 30, 1863, after the five treaties hereinbefore mentioned had been made with the Shoshone Indians, Treaty Commissioner James Duane Doty wrote the Commissioner of Indian Affairs a letter as follows:

Acknowledging your letter dated July 22d I have to request that two or more copies of the Map lately prepared at the General Land Office may be procured and son't to me, that I may be enabled to show the bound of the control of the Military Map of Utah; but this does not milit the northern part of the Shooknook Country.

Reporter's Statement of the Case September 22, 1863, the Commissioner of Indian Affairs replied and transmitted copies of the map requested.

November 10, 1863, Commissioner Doty wrote the Commissioner of Indian Affairs as follows:

The man transmitted to me by the department is herewith returned, with the exterior boundaries of the territory claimed by the Shoshonees in their recent treaties, as also the lines of the country occupied by different portions of the tribe, indicated upon it as correctly as the map will allow. They fixed their eastern boundary on the crest of the Rocky Mountains; but it is certain that they, as well as the Bannacks, hunt the buffalo below the Three Forks of the Missouri, and on the headwaters of the Yellowstone and Wind rivers.

As none of the Indians of this country have permanent places of abode, in their hunting excursions they wander over an immense region, extending from the fisheries at and below Salmon Falls, on the Shoshonee river, near the Oregon line, to the sources of that stream, and to the buffalo country beyond. The Shoshonees and Bannacks are the only nations which, to my knowledge, hunt together over the same ground.

Replying further to your letter, dated July 22, 1863. I beg leave to refer to my letter to the Commissioner. dated February 7, 1862, in relation to the Indian tribes in this superintendency; and to add that the bands represented at the treaty of Fort Bridger, on the second day of July last, it was estimated, numbered between three and four thousand souls, over a thousand of whom were present at, and immediately after, the

conclusion of the treaty

They are known as Waushakee's band, (who is the principal chief of the nation,) Wonapitz's band, Shauwuno's band, Tibagon's band, Peosstoagah's band. Totimee's band, Ashingodimah's band, (he was killed at the battle on Bear river), Sagowitz's band, (wounded at the same battle,) Oretzimawik's band, Bazil's band, Sanpitz's band. The bands of this chief and of Sagowitz were nearly exterminated in the same battla.

The chiefs at this treaty, in fact, represented nearly the whole nation; and they were distinctly informed and they agreed that the annuities provided in this treaty, and such others as might be formed, were for the benefit of all the bands of the Shoshonee nation who might give their assent to their terms; and this has been the understanding at each treaty. 449973-42-CC-vol. 95-44

Reporter's Statement of the Case At the treaty concluded at Box Elder on the 30th of July, the first object was to effect and secure a peace with Pokatello, as the road to Beaver Head gold mines, and those on Boisé river, as well as the northern California and southern Oregon roads, pass through his country. There were present Pokatello's band, Tormontso's band, Sanpitz's band, Tosorvetz's band, Bear Hunter's band, (all but seven of this band were killed at Bear river battle.) Sagowitz's band. This chief was shot by a white man a few days before the treaty, and could not come from his weekeeup to the treaty ground, but he assented to all of its provisions. He and Sanpitz endeavored to be at Fort Bridger, to unite in the treaty there, but did not arrive in time. The chiefs of several smaller bands were also present and signed the treaty, which is considered of more importance than any made this season, in saving the lives and securing from depredations the property of our citizens, emi-grants as well as others. These bands are generally known as "the Sheep-Eaters," and their number is estimated at one thousand.

At the treaty concluded at Ruby valley, on the 1st of October, the western Shoshonees were represented by the two principal bands, the Tosowitch (White Knife) and Unkoahs. From the best information I could get I estimated the western bands, sometimes called Shoshonee Diggers, at twenty-five hundred souls; but the bands on the Lower Humboldt and west of Smith's creek are not included in this estimate. Governor Nye proposed to meet some of them at Reese river, on his return to Carson from Ruby.

At the treaty at Tuilla valley, on the 19th of October, with the Goship or Kumumbar bands, who are connected with the Shoshonees, and are chiefly of that tribe, there were three hundred and fifty present. Others from Ibapah, Shell creek, and the Desert, would have joined them but for their fear of the soldiers: they number about one hundred more; and there is also a portion of this tribe who are mixed with the Pahvontee tribe, and occupy the southern part of the Goship country, amounting to two hundred more. They are the poorest and most miserable Indians I have met; they have neither horses nor guns. I have seen several of them at work for farmers at Deep creek and Grantsville, and therefore conclude that they would soon learn to cultivate the ground for themselves, and take care of stock, if they were assisted in a proper way. They have expressed a strong desire to become settled

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Reporter's Statement of the Case as farmers, and I should be glad to see them located as such, at a distance from the overland mail route. More

than a hundred of them have been killed by the soldiers

during the past year, and the survivors beg for peace.

It was the intention and understanding that all of the Goship tribe shall participate in the benefits of the treaty.

At the treaty of Soda Springs, on the 14th of October, with the mixed bands of Shoshonees and Ban-

nacks roaming in the valley of Shoshonee river, there were one hundred and fifty men present with their families.

Tindoah and the chiefs of several other hands sent word that they assented to the treaty, and desired to be considered parties to it, but they could not remain,

as it was so late in the season they were compelled to leave for their buffalo hunting-grounds. I have seen these bands on Snake river, in the month of May last, in council, found them peaceable and friendly, and

explained to them the objects for which it was proposed to hold a treaty before the snow fell. Those now present were, Toso-kwauberaht, the prin-

cipal chief of the Bannack nation, commonly known as Grand Coquin, Tangee, Matigund, and other principal men. This last chief and his band live at the Shoshonee River ferry, where he meets all the travelers

to and from the mines. He has always been friendly to them; and all of these bands can render great service to the emigrants, or do them great injury. They number about one thousand souls, as near as I can

ascertain. The whole number of Shoshones, Goships, and Bannacks, who are parties to these treaties, may be estimated at eight thousand six hundred and fifty. The amount to be paid to them annually in goods, &c., is-to the Shoshonees and Bannacks twenty thou-

sand dollars and to the Goships one thousand dollars, for the term of twenty years. This last sum I think ought to be increased to two thousand dollars, especially if they are to be settled as husbandmen or herdsmen. The importance of these treaties to the government and to its citizens can only be appreciated by those

who know the value of the continental telegraph and overland stage to the commercial and mercantile world, and the safety and security which peace alone can give to emigrant trains, and to the travel to the

gold discoveries in the north, which exceed in richness-

at least in the quality of the gold—any discoveries on this continent.

The pectionst portion of the may referred to not transmitted by Commissionen Doty with the above-puted letter, showing the approximate exterior boundaries estimated by him is reproduced on the following page. The word "North" has been written on the may by the court for the purpose of this opinion. The heavy line thereon was intended to represent the approximate exterior boundary of the entire territory in which the entire Shoohone tribe of Indians and the Bannock bands of Indians affiliated with them had been found to live, ream and hunt, and, to some extent, the continuous control of the control of the control The smaller lines on the map in the southwest portion thereof were intended to indicate approximately the territory described (1) by Pocatello, (2) the Western Bands, and (3) the Shoohone-Goohip Bands.

15. In negotiating and making these five treaties with the various groups or hands of Shoshone and Bannock Indians. the treaty commissioners representing the United States and the Indians did not negotiate or agree with reference to the acknowledgment by the United States of any exclusive use and occupancy right or title of the Indians to the territory to the extent described or claimed by them at the request of the treaty commissioners; nor did the treaty commissioners on behalf of the United States negotiate or agree with the Indians with reference to the relinquishment by the Indians of any claim which they might make or have with reference to any territory. It was not the purpose of the treaty commissioners to agree or acknowledge on behalf of the United States as to any rights or title to any territory or as to boundaries and they made no attempt to ascertain accurately the boundaries of any territory which the Indians may have actually occupied, possessed and used to the exclusion of other Indians or tribes of Indians. The matter of Indian use and occupancy rights or the extinguishment of any claim or right which the Indians might make or have to such use and occupancy, as a stipulation or acknowledgment in the treaties, did not enter into the negotiations and



was it is our of consideration in the distribute and making for the treatile in question. The polarons proposed for the branch States and the treaty commissioners expressating it, in suggesting and nowing the treaties in predict was to bring steet passed at and annihilate relations between the Governsor and the brings of the Shooleen States, or reline, and we have a superior of the states of the Shooleen States, or reline, and the stated amount in such actions with President night some carallels to their waste and conditioning to the resident night some carallels to their waste and conditioning to the resident night some of travel by the whites through the portion of the country occupied by the Indians and the settlements therein by the Indians and the settlements therein by the Indians.

16. The five treaties hereinbefore mentioned were transmitted to the President by the Secretary of Interior, and on or about January 5, 1864, the President transmitted the treaties to the Senate with the following communication:

I herewith lay before the Senate, for its constitutional action thereon, the following described treaties, viz:

A treaty made at Fort Bridger, Utah Territory, on

A treaty made at Fort Bridger, Utah Territory, on the 2d day of July, 1683, between the United States and the chiefs, principal men, and warriors of the eastern bands of the Shoshonee nation of Indians; A treaty made at Box Elder, Utah Territory, on the

30th day of July, 1863, between the United States and the chiefs and warriors of the northwestern bands of the Shoshone nation of Indians; A treaty made at Ruby Valley, Nevada Territory, on the 1st day of October, 1863, between the United States

and the chiefs, principal men, and warriors of the Shoshonee nation of Indians; A treaty made at Tuilla Valley, Utah Territory, on the 12th day of October, 1863, between the United States and the chiefs, principal men, and warriors of

the Goship bands of Shoshones Indians;
A treaty made at Soda Springs, in Idaho Territory,
on the 14th day of October, 1963, between the United
States and the chiefs of the mixed bands of Bannacks
and Shoshoneses, occupying the valley of the Shoshones
river;
A letter of the Secretary of the Interior, of the 5th

instant; a copy of a report, of the 30th ultimo, from the Commissioner of Indian Affairs; a copy of a communication from Governor Doty, superintendent of Indian affairs, Utah Territory, dated November 10, 1863, relating to the Indians parties to the several treaties herein named; and a map, furnished by that gentleman, are herewith transmitted.

17. Each of the five treaties was ratified by the Senate, and to each of the treaties made with the Eastern Shoshones on July 2, the Northwestern Shoshones July 30, the Goship-Shoshones October 12, and the mixed bands of Bannecks.

Reporter's Statement of the Case and Shoshonees October 14, 1863, the Senate added the following amendment:

Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed

in them upon the acquisition of said territories from Mexico by the laws thereof.

18. The treaty with the plaintiff bands as amended was ratified March 7, 1864. The amended treaty was in due course submitted to plaintiff bands and was ratified and accepted by them November 18, 1864, and proclaimed by the

President January 17, 1865. 13 Stat. 663-665. 19. With the exception of the mixed bands of Bannocks and Shoshones, all of the bands of Shoshone Indians above mentioned assented to and accepted the amendment of the Senate to their respective treaties (13 Stat. 663, 13 Stat. 681, 18 Stat. 685, 18 Stat. 689). The mixed bands of Bannocks and Shoshones, with whom the treaty of October 14, 1863, was made and subsequently ratified by the Senate with the amendment above-mentioned, were never assembled for the

purpose of obtaining their formal assent, apparently for the

reason that they became so scattered as to render it impossible to assemble them; the treaty was therefore never proclaimed by the President.

20. The treaty with the Western Band of Shoshones, dated October 1, 1863, came up for consideration in the Senate at the same time, i. e. March 7, 1864, as the other four treaties. The Senate first voted to ratify the Western Shoshone treaty with the same amendment that was made to the other four treaties but, in the same executive session on the same date, the Senate voted to reconsider its action. with respect to this particular treaty. While the other four Shoshone treaties were ratified March 7, 1864, as hereinbefore mentioned, the Senate did not take final action on the Western Shoshone treaty until June 26, 1866, at which time this treaty was ratified without amendment except for the filling in of the blank space in Art. 3 as to the amount of

the annuity to be paid under the treaty to those Indians. 21. Prior to and at the time of the making and the ratifi676 95 C. Cln. Reporter's Statement of the Case cation of the treaty with plaintiff bands of the Shoshone Indians, the United States had not recognized and did not. at that time, recognize a right of exclusive use, occupancy, and possession in plaintiff bands as against the United States to any territory which was within the Mexican Cession and included in that described by Pocatello, and now claimed by plaintiff bands. The treaty of July 30, 1863, with plaintiff bands contained no express or implied stipulation of recognition or acknowledgment by the United States of any right. title, or interest in any land, and the United States, in making and ratifying the treaty, did not intend that it should be a stipulation of recognition and acknowledgment of any exclusive use and occupancy right or title of the Indians, parties thereto. On the contrary, the United States has ever exercised dominion and complete ownership over the territory and land for which plaintiff bands now seek to recover compensation. The treaty was intended to be, and

was, a treaty of peace and amity with stipulated annuities for the purposes of accomplishing those objects and achieving that end. 22. Subsequently the following act of Congress was ap-

proved February 23, 1865; 13 Stat. 432; That the President of the United States be, and be is hereby, authorized, by and with the advice and consent of the Senate, to enter into treaties with the various tribes of Indians of Utah Territory, upon such terms as may be deemed just to said Indians and beneficial to the government of the United States: Provided, That such treaties shall provide for the absolute surrender to the United States, by said Indians, of their possessory right to all the agricultural and mineral lands in said territory except such agricultural lands as by said treaties may be set apart for reservations for said Indians: And Provided, Further, That all such reservations shall be selected at points as remote as may be practicable from the present settlements in Utah Territory

Sec. 2. And be it further enacted. That in agreeing with said Indians upon the amounts to be paid to them under the provisions of the treaties to be negotiated in pursuance of this act, care shall be taken to obtain from the Indians, to the greatest possible extent, their consent Reporter's Statement of the Care
to receive for such payments agricultural implements,
stock, and other useful articles, rather than money.

soc.a., and user useful articles, rather than money.

Sec. 3. And be it further enacted, That for the
purpose of negotiating and treaties and carrying out
the treaty provisions of this act, making presents to
each of the control of the control of the control
and to such angulation, there is benefy appropriated,
out of any money in the treasury of the United States
not otherwise appropriated, the sum of twenty-five
thousand dollars.

23. No further treaty or agreement was ever negotiated. made, or attempted to be made, with the plaintiff bands of Shoshone Indians or any of the other bands of the Shoshone Nation, or tribe, other than the Eastern bands of the Shoshone Tribe with which a treaty was made July 3, 1868, and was ratified February 16, 1869, and proclaimed February 24, 1869, 15 Stat. 673; (Shoshone Tribe of Indians of the Wind River Reservation in Wvoming v. United States. 85 C. Cls. 331). In this treaty these Eastern bands relinquished all title, claim, or rights in or to any and all territory of the United States except a portion of country described therein containing 3.047,730 acres in the Wind River section of the present State of Wyoming which was set apart by this treaty of 1868 for their absolute and undisturbed use and occupancy and for such other friendly tribes or individual Indians as, from time to time, they might be willing with the consent of the United States to admit amongst them.

28. After the making of the treaty of July 30, 1886, the plaintift bands beame widely scattered over northern Unhand Nevedas, and southern Idaho. In 1878 the Commissioner of Indian Affairs appointed a commission to investigate all tribes and bands in this region and to ascertain them rumber and the probability of gathering them upon one or more reservations where they could be more immediately under the care of the Government. The commission and an an experted that it had no trustworthy information as to the number of bands of the Northwestern Schooleno Institut. The commission further reported that a part of the Northwestern Schooleno Institut.

Reporter's Statement of the Case of July 30, 1863) had already gone to the Fort Hall (Idaho) Reservation in southeast Idaho, and that Chief Tav-i-wunshea, with his small band, had gone to the Wind River (Wyoming) Reservation created and set apart under the treaty with the Eastern Shoshones in 1868. Toomontso (who had signed the Northwestern Treaty of July 30) and his band at about this time took up their abode on the Fort Hall Indian Reservation and an indefinite number of Indians of this band had gone to the Wind River Reservation. Eventually the remnants of the hands of Indians under San Pitz (a signer of the Northwestern Shoshone treaty of July 30), and Saigwits, also a party to the treaty, were induced by the commission to remove to the Fort Hall Indian Reservation, thus making a total of 400 Northwestern Shoshone Indians on the Fort Hall Reservation. The commission further reported that a careful enumeration disclosed that there were 400 Northwestern Shoshone Indians in southern Idaho. In 1873 a number of Northwestern Shoshone Indians had gathered in northeastern Nevada and were assigned by the Indian Agent in Nevada to a small area in that section as a home. On May 10, 1877, this tract, by order of the President, was withdrawn from sale or settlement and set apart as a reservation for the Northwestern Shoshone Indians, However, in 1879, all the Indians thereon, numbering about 300, were removed to the Western Shoshone Indian Reservation known as the Duck Valley Indian Reservation in southwestern Idaho and northern Nevada.

25. Art. 3 of the treaty of July 30, 1863, with plaintiff bands stated:

In consideration of the stipulations in the preceding articles, the United States agree to increase the annuity [\$10,000] to the Shoshone Nation five thousand dollars, to be paid in the manner provided in said treaty, \* \* \*

treaty,

Following the final ratification of this treaty with plaintiff bands, there was appropriated by Congress for the
"Northwestern Bands of Shoshones" annually for twenty
years the sum of \$5,000, as stipulated in the treaty of July
30, 1893, with plaintiffs. The total so appropriated for the

Reporter's Statement of the Case years 1865 to 1884, inclusive, for plaintiff bands was \$100,000,

The sums so appropriated, together with the sums appropri-

ated for the Western bands and the Shoshonee-Goship bands

of the Shoshone Tribe, were carried on the books of the

Treasury under the heading "Fulfilling treaty with Shoshones," In the Indian Office, however, the sums appro-

printed for the "Northwestern Bands of Shoshones" for the

first 18 instalments were carried on subsidiary ledgers under the heading "Fulfilling treaty with Shoshones, Northwestern Bands," Of the sum of \$90,000 appropriated for the first

18 instalments and credited to this fund on the ledgers of the Indian Office, a total of \$77,195.83 was expended for annuity goods for plaintiff bands leaving a deficiency of \$12.804.17. However, the amount of \$2,000 of this deficiency was subsequently recovered from Agent How and credited

to the fund "Fulfilling treaty with Shoshones," which was a fund applicable to the fulfillment of the treaty stipulations with plaintiff bands and other bands of the Shoshones. The last two treaty appropriations for the fiscal years 1883 and 1884 of \$5,000 each for plaintiff bands, \$5,000 each for the Western hands, and \$1,000 each for the Goship bands. totaling \$22,000, were carried under the control appropria-

tion "Fulfilling treaty with Shoshones." No attempt was made by the Government's accounting officers to apportion the expenditures out of this fund among these bands, which appears to have been due to the fact that by this time the

identity of the Shoshone Indians which had been known as the "Northwestern Bands" upon the Western Shoshone Reservation and other reservations, as hereinbefore mentioned, had been practically lost. This fund of \$22,000 was supplemented by various amounts aggregating \$3,861.78, in which amount was included the sum of \$67.50, being an unexpended balance from the fund "Fulfilling treaty with

Shoshones, Northwestern Bands," and the \$2,000 recovered from Indian Agent How from advances made to him, making a total of \$25.861.78 available under the appropriations and in the accounts of the Government for disbursement pursuant to the treaties with the Northwestern, Western, and Goshin-Shoshone hands of the Shoshone Tribe of In-

dians. A total of \$25,728,67 was disbursed out of this fund

for treaty goods at the Yestern Shoshon Agency in Newada under the appropriation "Fulfilling treaty with Shoshons" without distinction or suggregation of the accounting records as to the amounts of money disbursed for goods for each group of the Northwestern, Western or Shoshons-Goship Indians. The treaty goods and provisions purchased with the money appropriate for each group of the More and the purchased with the money appropriate for each group of bands were disbursed to the Indians of the bands entitled thereto. The Shoshons was achieved in the Shoshons was achieved to the Shoshons was

The deficiency in the disbursement of annuity appropriations for treaty goods and provisions due plaintiff bands from the total of \$100,000 appropriated by Congress for this purpose is \$10,804.17.

The court decided that plaintiff bands of the Shoshone Indians were not entitled to recover under the treaty of July 30, 1863, as for a taking by the United States of any portion of the land for which compensation was claimed.

The court further decided that plaintiff bands were entitled under Article 3 of the Treaty of July 30, 1883, to recover \$10,894.17, subject to deduction of offsets, if any, under the terms of section 3 of the Jurisdictional Act, which offsets, if any, are reserved for determination as provided in Rule 88e of the Court of Claims.

LITTLETON, Judge, delivered the opinion of the court: Section 1 of the Jurisdictional Act (45 Stat. 1407) provides as follows:

That jurisdiction be, and breeby is, conferred upon the Court of Chism, notwithstanding laws of time or statutes of limitations, to hear, adjudicate, and render both of the Court of Chism, and the Court of Chism and the Court of Stocken Indians may have against the United States arising under or growing out of the treaty of July 2, 1860 (18 State, 85.2 & English e 491); resay of July 2, 1860 (18 State, 85.2 & English e 491); resay of Courges approved Deember 15, 1974 (18 Stat. 201), and any subsequent treaty Act of Courges, or Executive orlar, which claims have not hereofers been deterdined to the Chism of the Supreme Court of the United States.

The treaty of July 2, 1863, mentioned above, was with the Eastern bands of the Shoshone Nation, and is set forth. in finding 9. The treaty of July 30, 1863, was with plaintiff bands of the Shoshone Nation, and is set forth in finding 10. The act of Congress approved December 15, 1874 (18 Stat. 291, 292), was an act ratifying an agreement of September 26, 1872, with the Eastern bands of the Shoshone Indians ceding to the United States a portion of a reservation in the Wind River Valley of Wyoming set apart for the exclusive use and occupancy of said Eastern bands by the treaty with them of July 3, 1868. The plaintiff bands were not parties to the treaty of 1868 or the agreement of 1872. See 85 C. Cls. 331. The act of December 15, 1874. had no reference to the treaty of July 30, 1863, with plaintiff bands and did not affect that treaty, or any of the territory claimed in this proceeding. There were no tresties or acts of Congress subsequent to the treaty with plaintiff bands of July 30, 1863, other than the act of February

for compensation. In order to recover in this case, plaintiff bands must show that in the treaty with them of July 30, 1863, or in the treaty of July 2, 1863, with the Eastern Bands of the Shoshone Nation, which was made a part of the treaty with plaintiff bands, the United States, acting through the appropriate officials of the Department of Indian Affairs. the treaty commissioners, who negotiated and made the treaty with these bands, the President, and the Senate expressly or by necessary implication recognized, acknowledged, and conceded under the terms of these treaties the exclusive possessory use and occupancy right or title of plaintiff bands of the Shoshone Indians as against the

23, 1865, 13 Stat. 432, set forth in finding 22, which made reference to any part of the territory in which was located any of the land for which plaintiff bands herein make claim

United States in the whole or some part of the territory of 15,643,000 acres of land for which they now make claim for compensation as for a taking in violation of that treaty of July 30, 1863. The question whether under the Mexican laws at the

time of the Mexican Cession of 1848 plaintiff bands had use

and occupancy rights—that is, "Indian talle"—to certain and occupancy rights—that is, "Indian talle"—to certain properties of the control of the control of the rights of the right of the definited state of the right of the rights of the right of the definited state of the right of the rights of the right of the rights of the right of the rights of

and the court said:

Basic to the present causes of action is the theory that the lands in question were the ancestral home of the Walapais, that such occupancy constituted "Indian title" the United States agreed to extinguish, and that in absence of such extinguishment the grant to the rail-road "conveyed the few subject to this right of court of the country of the country of the subject to this right of court of the country of the coun

Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any care in a superior of the control of the

"Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." Ormer v. United States, 30: U. S. 219, 227. "Mattewer United States, 30: U. S. 219, 227. "Mattewer with law, the Cremer case assumed that lands within the Maxican Cession were not excepted from the policy to respect Indian right of occupancy." " " by the property of the policy to respect Indian right of occupancy." " "

Plaintiff bands contend that in their treaty of 1863 the United States recognized, acknowledged, and conceded their aboriginal use and occupancy right or title to the territory within and without the Mexican Cession and that no action of the United States has ever extinguished this occupancy right or title.

right or title.

The defendant contends that there was no such acknowledgement in this treaty by the United States of the exclusive use and occupancy title of plaintil Bands to any portion of the lands claimed by them as against the Government, but that the treaty was intended to be, and was, a treaty of that the treaty was intended to be, and was, a treaty of and provisions for the Indians, parties to the treatis, in rare for such pasce and amity by the ending of attacks upon sattlers and depredations committed in the territory inhabities and reamed over by them, and upon the white emigrants passing through such country on the overland raties to California, Gragow, and the mining regions of

We are of opinion from a careful consideration of the treatis of sluly 2 and July 20, 1885, in the light of the facts and circumstances disclosed by the record and the history of the times below and after the treatise with plainitif lands and other bunks of the Shoshoun nation or tribe that the properties of the shoshoun nation or tribe that the United State did not in the treaty with plainifi bands recognize or acknowledge the use and occupancy right or title in plainific Bands as against the Government to the whole or any portion of the territory now chiance by them. United States has were exercised dominion and complete ownesship over the territory for which plaintiff bands now make chain. No subsequent treaty or agreement was ever-

make claim. No subsequent treaty or agreement was ever and evit plainidf bands. At the fact that plaintif bands may have inhabited, claimed, possessed, and occupied the whole or a part of the territory of 15,684,000 acree of hand now claimed by them to the exclusion of other tribes of Indiana, and with the recognition of the other tribes, would not entitle plaintiff bords been exceededly to manitain the claim invivale in this said or substrain the court or enter judgment thereon based on immemorial or abertigi-

pancy said-

Opinion of the Court nal possession and occupancy, Hayt, Administrator, v. United States, 38 C. Cls. 455, 462; Dunoamish et al. Tribes of Indians v. United States, 79 C. Cls. 530, 599, 600, Cf. Coos Bay Indian Tribes et al. v. United States, 87 C. Cls. 143: The Wichita and Affliated Bands of Indians in Oklahoma et al. v. United States, 89 C. Cls. 378, 420. The jurisdictional act does not embrace such a claim independent of the treaty of July 30, 1863; therefore, unless the defendant by this treaty recognized and acknowledged that the plaintiff bands had exclusive possessory use and occupancy title, they are not entitled to recover as for a taking by the United States. The fact that the treaties of July 2 with the Eastern bands and of July 30 with plaintiff bands did not contain any express provision or language with reference to the matter of extinguishment of any claim, right, title, or interest of the Indians in respect of the territory inhabited by them does not establish that, by the treaty, the United States recognized and acknowledged the existence of such right or title as against its own title. Without doubt the United States had the unquestioned right to exercise complete dominion and ownership of the territory in which plaintiff bands were found in and prior to 1863. In United States of America, as Guardian, etc., v. Santa Fe Pacific Roil. road Co., supra, the court in referring to rights and title of Indian tribes based on aboriginal possession, use, and occu-

Nor is it true, as respondent [Railroad] urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the Cramer case, "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive." 261 U.S. at 229.

In speaking with reference to the matter of extinguish-

ment of Indian title, the court further said:

Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner. method, and time of such extinguishment raise political. not justiciable issues. Butts v. Northern Pacific Railroad, supra, p. 66. As stated by Chief Justice Marshall

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Opinion of the Court in Johnson v. M'Intosh. supra, p. 586, "the exclusive

right of the United States to extinguish." Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. Bescoher v. Wetherby, 98 U. S. 517, 625.

In and prior to 1850 the Government had practically no knowledge with reference to the Indians inhabiting the country which became southern Idaho, eastern Oregon, northern Nevada, and northern Utah or of any particular areas occupied by any particular tribes or bands, and knew very little as to tribal distinctions. From 1849 until 1863, when the five treaties mentioned in the findings were made with the different bands of Indians of the Shoshone nation or tribe, and subsequently, the Government Indian agents and superintendents of Indian Affairs in Washington and Utah territories, in which the States of Idaho, Nevada, Utah, and Wyoming now are located, acquired in their travels and contacts with the Indians some information as to the locations of various hands of these Indians and the area in which they lived and over which they roamed and hunted. but such information was general in character and indefinite as to boundaries of specific areas and, also, as to specific bands or individual Indians of specific tribes. The Utah Superintendency of the Indian Department was located at Salt Lake and the agents and representatives of the Government at this superintendency made various trips among the Indians in that territory and westward, across what is now Nevada, in the vicinity of white settlements and along the overland trails to California, Oregon, and Idaho. The overland trail to California passed through the territory then occupied by the Eastern bands of Shoshones in what is now the southwestern portion of Wyoming and the northeast corner of Utah, through the territory occupied by plaintiff bands in what is now northeast Utah and southeast Idaho, through the territory occupied by the bands of Bannocks and Shoshones in northeast Idaho, the Goship-Shoshone bands in western Utah below Salt Lake, and the Western hands of the Shoshones in northeast Nevada. The

Opinion of the Court main California trail came through southwest Wyoming over the mountains into northeast Utah north of Great Salt Lake and across that portion of Utah to Nevada and south, in Nevada, to the Humboldt River and along that river westward across that state to California.

The Shoshone Tribe of Indians and the various bands thereof, with a few exceptions hereinafter mentioned, desired to be and were peaceful and friendly to the whites and the Government. The Shoshone nation, or tribe, as such, has never made war upon the United States or the white settlers. The bands of Shoshone Indians inhabiting the territory which became northern and western Utah, southern Idaho and northeastern Nevada were poor; the territory in which they lived was mostly desert country, and there was only a sparse supply of game and food. The white emigrants and settlers during the period from 1849 to 1863 practically destroyed the source of livelihood of the Shoshone Band of Indians in this territory. The result of this was that a number of Indians of the Northwestern Bands, and nerhans some of the other hands, made attacks upon the white settlers and emigrants and committed depredations from time to time up to January 1863. The record shows that the Indian agents and some of the military representatives of the Government traveling through a portion of the territory in which these Indians were found gave the various Indians, as far as they were able so to do, some provisions and supplies as presents for the purpose of endeavoring to end these attacks and depredations. The agents found that all the Indians desired peace but they were strong in their protestations of the destruction of their means of livelihood and begged the Government agents to bring them presents and provisions. The agents found and from time to time reported to the Commissioner of Indian Affairs, and the Commissioner of Indian Affairs reported to Congress in his annual reports that these Indians were practically in a starying condition by reason of destruction of their source of food and that they were desirous of peace: that the attacks and depredations were doubtless being committed because of their condition and because they deemed it necessary to "steal or starve." The record also shows that the acts and conduct of certain unscrupulous whites also contributed to depredations by some of the Indians.

The Secretary of Interior and the Commissioner of Indian Affairs constantly recommended to Congress that some provision be made for assistance to and care of these Indians and that an appropriation be made and authority granted to negotiate treaties with them with a view to bringing about a permanent peace. It was not, however, until the enactment of a provision in the Appropriation Act of July 5, 1862, 12 Stat. 512, 529, that Congress made any appropriation for the assistance of these Indians or authorized the negotiation of a treaty with them. In that act Congress appropriated \$20,000 "for defraving the expenses of negotiating a treaty with the Shoshonees or Snake Indians. \* \* \*, to be expended under the direction of the Secretary of the Interior." The Secretary of the Interior had asked for \$45,000, but Congress evidently thought that \$20,000 would be sufficient to secure a treaty of peace. (See finding 4.)

Treaty commissioners were duly appointed and given instructions as set forth in finding 5. There was delay on the part of the commissioners in communicating to the Indians the intention of the Government to negotiate with them for peace and for payment of annuities, with the result that the attacks and depredations continued. Early in January 1863 the military authorities in the District of Utah learned of the encampment on Bear River, in the southeast corner of Idaho, of a large body of Indians from the Northwestern Bands and attacked this group of Indians in force and killed 224 of them. Thereafter, on or before June 1, 1863, the treaty commissioners, the chairman of which group was James Duane Doty, then superintendent of Indian Affairs for the Territory of Utah, began their work of negotiating with the Indians. The commissioners concluded that it would be best to meet and negotiate with the various bands of the Shoshone tribe in groups at different points for the reason that "The Shoshone bands are scattered over so vast an extent of country that it will be necessary for the commissioners to meet them at several points. The whole nation can never be assembled without

Opinion of the Court bringing them hundreds of miles." Most of the bands of this tribe, other than the Eastern bands, were without horses or other means of transportation. After the making of these treaties and the furnishing of annuities in goods and provisions, the Indians remained peaceful and did not cause the United States or the white settlers any serious trouble The territory ceded to the United States by Mexico February 9, 1848, under the treaty of Guadalune Hidalgo, 9 Stat. 922, 929, added to the United States the area of what is now California, Nevada, Utah, Arizona, New Mexico, and a part of Colorado. Of the total of 15.643,000 acres of land claimed by plaintiff bands in this proceeding, 9,576,000 acres are located in Utah and Nevada within the Mexican Cession; the balance, or 6,067,000 acres, is located in southeast Idaho. Of the 25,197,000 acres described by the Eastern Bands of Shoshone Indians in the treaty with them of July 2, 1863, 7,552,000 acres are located in what is now northwest Colorado and northeast Utah, within the Mexican Cession, and the balance of 17.644,000 acres is located in what is now Wyoming and Idaho. All of the territory inhabited and described by the Goship-Shoshone Bands of Indians in the treaty with them of October 19. 1863, was located within the Mexican Cession, as was all the territory inhabited and described by the Western Bands of Shoshones in their treaty of October 1, 1863, (18 Stat. 689.) All the territory which the treaty commissioners indicated as being inhabited by the Mixed Bands of Bannocks and Shoshones was entirely within what is now northeast Idaho and western Wyoming, no part of which is in the territory of the Mexican Cossion

In the Act of September 30, 1850 (9 Stat. 544, 558), Congress made an appropriation of \$20,000 "to enable the President to hold treaties with the various Indian tribes in the State of California." (Cf. Act of June 5, 1850, 9 Stat. 437, and page 555, paragraph 12, of the Act of September 30, 1850, supra.)

Eighteen separate treaties were negotiated between March 19, 1851, and January 7, 1852, with some of the tribes and bands of Indians in California. These treaties with the Indians of California were submitted to the Senate by the

President on June 1, 1852, for action, and on July 8, 1852, the Senate by unanimous vote adopted a resolution on each treaty refusing to give its consent thereto. This action of the Senate was due to the fact that at that time it did not desire to recognize in the Indians any possessory use or occupancy right, title or interest as against the United States to any specific lands for the reason that the United States in acquiring the territory from Mexico succeeded to all rights in the soil, possessory and otherwise, and the Government regarded itself as the absolute and unqualified owner; that since the Indians had no possessory, occupancy, or other rights therein which were to be in any manner respected, the United States was under no obligation to treat with the Indians occupying the same for the extinguishment of their title. The Executive Department and the Senate had that policy or attitude in mind in 1863 and 1864 when the treaty with plaintiff bands of the Shoshone Indians was negotiated, made, and ratified with the amendments hereinafter mentioned.

The treaty of July 30, 1863, with plaintiff bands and the treaty of July 2, 1863, with the Eastern Bands of the Shoshone Nation (findings 9 and 10) were ratified with the following amendment added by the Senate:

Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof.

All the remaining treaties with the various bands of the Shoohoo Tribe of Indians were ratified with like amendment March 7, 1864 (18 Stat. 663); however, action on the treaty with the Western Band of Shoohone Indians was reconsidered by the Secate on the same day and final action thereon was taken on June 25, 1606, more than two years later, when staken on June 25, 1606, more than two years later, when filling in of the blank space therein as to the amount of the annuity of \$5000 per annum for twenty years. Why the amendment above quoted, which was added to the other treaties, was first added to the Western Shoohone treaty

Opinion of the Court but finally left out when the treaty was subsequently ratified does not appear; but we think that has no important bearing upon the question of rights of plaintiff bands under their treaty. A subsequent change of attitude or policy toward these Indians would not, without more, constitute a recognition or acknowledgment of title by a prior treaty which did not disclose such an acknowledgment. In view of the position thus taken by the United States, we think it cannot be said that the treaty with plaintiff bands recognized and acknowledged any right, title, or interest in them to the territory which they may have occupied or to which they now make claim. Although the plaintiff bands, insofar as other tribes were concerned, may have exclusively occupied and used all or a portion of the territory involved in their present claim as their aboriginal home (and the record is sufficient to show that they did), they are not entitled to recover for the reason that the inrisdictional act only authorizes this court to consider, adjudicate, and render judgment on a claim "arising under or growing out of the treaty" with them. Such a claim must be one that in within the terms of and supported by the provisions of the treaty Aboriginal occupancy and use is not such a claim. The record shows and we have found as a fact that the United States has never recognized, either at the time the treaty of July 30 was made, or subsequently, a right of exclusive occupancy in plaintiff bands to the territory claimed by them but that it has ever exercised complete dominion over the territory, and this is one method, or manner, so far as the present authority of the court to adjudicate is concerned, of extinguishing Indian title. United States v. Santa Fe Pacific R. R. Co., supra.

Moreover, in addition to what has hereinabore been said, the facts disclosed by the official records and communications of the Government show that it was not the intention of the Executive Department of the Government at the time of making the treaties with the Shoohous Ludius in 1056 and the contract of the Contrac

Ontains of the Court

reliable information as to the territory actually occupied by these Indians. The treaty commissioners were therefore given specific instructions, among others, not to undertake negotiations with the view to extinguishment of any Indian title to land. We think the effect of these instructions, together with others which followed (finding 6), was that the treaty commissioners were not to stipulate with reference to the recognition and acknowledgment on the part of the Government of any exclusive use and occupancy

title of the Indians to the land. Judging by what was done, we think the treaty commissioners so understood their

instructions. The commissioners therefore simply wrote into the various treaties the statements made by different groups or hands as to the "country described" or "claimed" by them, which descriptions by the Indians were very general and rather indefinite. Especially was this true in connection with the treaty of July 30 with plaintiff bands. In this treaty Chief Pocatello, of one of the bands, mentioned only the Raft River and the Porteneuf Mountains in describing the territory "claimed for himself and his people," and nothing was said with reference to the northern or southern boundaries and nothing whatever with reference to an additional territory of 6.255,000 acres of land now claimed by plaintiff bands lying wholly west of Raft River. Art. 4 of the treaty with plaintiff bands therefore simply stated: "The country claimed by Pokatello, for himself and his people, is bounded on the west by Raft River and on the

east by the Porteneuf Mountains." The purpose of obtaining a description of territory from the Indians was, as the letter of instructions of July 22, 1862, stated, to obtain as much information as possible as to what territory the Indians claimed, because the Government had no information in that regard from the Indians themselves, and very indefinite information otherwise as to the territory which they occupied.

We do not think the amendment added by the Senate constituted a recognition and acknowledgment of exclusive use and occupancy right or title by the Indians. That amendment did not have any relation to any territory not within the Mexican Cession. As to such territory montioned in the treaty as fell within the Mexican Cession, the amendment was simply a limitation on the right or manter of law, there was such a limitation under Mexican have in 1848. Without the amendment the treaty did not admit or deap shortjirnil occupancy, nor did it alcohovledge the right of exclusive use and occupancy as against the This amendment the therefore added nothing did not the contract of the

In 1939 the General Land Office prepared a map based on more accurate information which followed the general outlines roughly indicated by Commissioner Doty on the man (finding 14) which accompanied the treaties and this 1939 map also showed the boundaries to the extent mentioned in the various treaties. After indicating the exterior boundaries within the general outlines shown on the Doty man, the Government computed the acreage therein. The entire area embraced within the general exterior lines shown on the Doty map which accompanied the treaty, as corrected and computed on the 1939 map, comprised 80,825,000 acres of land. The entire population of the Shoshone tribe and affiliated Bannock bands of Indians in 1863 was between 9,000 and 10,000; the population of the Eastern bands was about 4,500; that of the Northwestern Bands, about 1,800; that of the Western bands, about 2,000; and that of the Goship-Shoshone Bands, about 1,000. The number of Bannocks, or the Mixed Bands of Bannocks and Shoshones not included in the above-mentioned population of the Eastern Bands, was about 400. No census was taken by the agents of the Government; these figures as to population are approximate.

Upon the whole record we are of opinion that plaintiff bands are not entitled to recover under the treaty of July 30, 1989, as for a taking by the United States of any land for the reason that the obtendant did not, in the treaty, paner by plaintiffs, and did not, by the treaty paner by plaintiffs, and did not, by the treaty, recognise or acknowledge any exclusive use and occupancy right and title of the Indians to the whole or any portion of the accesses here also did not the protein of the Indians to the whole or any portion of the accesses here admissed. In reaching this conclusion we thus

not departed from the rules to be followed in the interpretation of treaties with the Indians, as set forth in Jones v. Mechan, 175 U. S. 1, Justical States v. Wismas, 198 U. S. 371; Chordan Nation v. United States, 119 U. S. 1, 21; Chortern Nation v. United States, 179 U. S. 498, 531–534; Carpenter et al. v. Shan, 280 U. S. 303, 365; Blackfeet et al. This v. Third States St C. Cis. 101

Plaintiff bands claim that the defendant failed to fulfill the promises which it made in the treaty with reference to the annuity of \$5,000 per annum for twenty years, totaling \$100,000. This entire amount was appropriated by Congress in twenty annual instalments and the record satisfactorily shows that the total of the amount so appropriated except \$10.804.17 was expended and disbursed by the Government in goods and provisions for the Indians of the Northwestern Bands. How and why the deficiency of \$10,804,17 in the annuity goods due the Indians of the Northwestern Bands came about does not appear and the Government records do not disclose what became of this sum. After the treaty of July 30 with plaintiff Indians, band affiliations became practically lost. Some of these Indians went to the Wind River Reservation with the Eastern Band of Shoshones. some to the Fort Hall Indian Reservation in Idaho, some to the Western Shoshone or Duck Valley Indian Reservation in southwestern Idaho and northern Nevada, and an indefinite number of individual Indians of the Northwestern Bands continued to roam and live in northern Utah and southern Idaho and worked at times for white settlers. Whether this balance of \$10.804.17 was not expended and disbursed in annuity goods for the Northwest Shoshone Indians because they were so scattered or whether the appropriation lapsed and the fund reverted to the Treasury does not appear. Plaintiff bands have submitted no proof to show that the defendant took this money for its own use or took it from plaintiff bands and gave or expended it for

Indians other than the Indians of the Northwestern Bands. Plaintiff bands are entitled to recover this sum of \$10,504.17 to the extent that it may exceed any allowable offsets to which the defendant may show itself entitled under section 3 of the Jurisdictional Act on further proceedings under Rule 30(a). But plaintiff bands are not entitled to recover interest on this debicacy in the treaty versus a second of the control of the control of the twenty annuity instalaments were does, for the reason that the record does not establish that this money was taken by the United States under such circumstances as would entitle the plaintiff bands to interest as a part of just compensation of the control of the control of the control of the Oct. 2000. Oct. 2000.

The claim of plaintiffs for compensation as for a taking by the defendant of lands is dismissed, and an interlocutory order under Rule 39(a) is hereby entered reserving the determination of the amount of recovery, if any, in respect of the amount of \$10,904.17 after determination of the amount of offsets, if any, for further proceedings. It is so ordered.

MADDEN, Judge; Jones, Judge; Whitaker, Judge; and Whalat. Ohief Justice, concur.

ST. LOUIS REFRIGERATING & COLD STORAGE COMPANY v. THE UNITED STATES

[No. 48110. Decided March 2, 1942]
On the Proofs

Backe tax on electrical energy under the Revenue Act of 1932; "commercial" consumption.-Where the plaintiff operated a refrigerating system in the city of St. Louis, utilizing electrical energy in the operation of said system; and where plaintiff's business consisted of (1) the manufacture and sale of ice: (2) the manufacture, distribution, and sale of refrigeration through nine lines, the refrigeration being used for cold-storage boxes of produce dealers, for drinking water, for the air of buildings, and other needed purposes, and (3) the refrigeration of plaintiff's warehouses located in various parts of St. Louis in which were stored many kinds of perishable commod-Ities: It is held that the business of plaintiff is predominantly "commercial" in its nature within the meaning of section 616 (a) of the Revenue Act of 1982, levving a tax of 3 per centum of the amount paid for electrical energy for domestic or commercial consumption, and plaintiff is accordingly not entitled to recover.

Reporter's Statement of the Case Some.—The statute does not recognize a twilight zone between "com-

Bame; Treasury Regulations.—Treasury Regulations may not serve

to change the provisions of a statute.

Some.—It would be illogical to hold that the Government would be

bound by Trensury Regulations construed by the Commissioner of Internal Revenue as limiting the application of the taxing statute as expressed in the regulations and at the same time to disregard the Commissioner's interpretation of those limits.

The Reporter's statement of the case:

Mr. Walter W. Ahrens for the plaintiff. Messrs, John J. Hickey and James K. Polk were on the briefs.

Mr. James K. Polk for Consolidated Edison Company of New York, Inc., as amicus curiae. Mr. Robert E. Coulson was on the brief.

Mr. Hubert L. Will, with whom was Mr. Assistant Attorncy General Samuel O. Clark, Jr., for the defendant. Mears. Robert N. Anderson and Fred K. Dyar were on the brief.

The court made special findings of fact as follows:

1. The plaintiff, the St. Louis Refrigerating & Cold Storage Company, is a Missouri corporation with its offee and principal place of business located in St. Louis, It was interpreted in 180 collected by the Collection of the

To acquire, establish, event, construct, maintain, and operate refrigerating, cooling, and cold-storage works, and applicates, and is applicated, and is applicated, and is applicated, and is among by the public with refrigerating, cooling, would interpretaining, cooling, would interpretaining, cooling, would interpretaining, cooling, would be applicated to acquire, but of the property of its debte; to acquire, but on the property of its debte; to acquire, but on the property of its debte; to acquire, but on the property of its debte; to acquire, but on the property of the debte; to acquire, but on the property of t

Reporter's Statement of the Case such other devices and structures as may be necessary for the distribution of materials or agents for refrigerating or cooling purposes to the residents of said City, and for the return thereof, as is now permitted and authorized by Ordinance Number 15800 of said City of St. Louis, approved August 26th, 1890, and as may hereafter be authorized or permitted by future ordinances of said City; to acquire, make, use, lease, and sell refrigerators and all machines, apparatus, devices, appliances, and materials useful for or in connection with freezing, cooling, and ventilating processes, together with the products or residuum of such manufacture, processes, or materials; to manufacture and sell ice, and to sell or lease rights to use patented processes, devices and apparatus for freezing, cooling, or ventilating purposes,

The plaintiff and its predecessor, the St. Louis Automatic Refrigerating Company, by ordinances of the City of St. Louis, were granted the right

\* to construct, maintain and operate refrigerating works within the Gity of St. Louis, together with the right-of-way along, upon and under the avenues, attent, bridges, alleys, inare, scoins, market houses placing, operating, and maintaining main-pipes and all necessary freders and service pipes in connection thereas and service pipes in connection thereas and service pipes in connection thereas a service of the service of the distribution of liquid analysirus amonain or other compressed lipeding as or gases for refrigerating purposes, and for the conveyance of the interpretable of refrigeration. \*\* gase or fultile under the process of refrigeration \*\* gase or fultile under the process of refrigeration.\*\*

3. The plaintiff now is, and for many years, including the period from June 2, 11930; Lo August 21, 1933; Including the period from June 2, 11930; Lo August 3, 1933; Includive, was engaged in (1) manufacturing ice for sale to its customers; Cgi distributing a refrigerating again in liquid form through its franchise, for the purpose of producing erfrigerating agent from the customers, and removing the erfrigerating agent from the customers' premises in vapor form to reluquely it at plasmitt's plant for excluding its angle of the relucion of the purpose of producing architecture and continued to the produce of the purpose of th

Repetitive Statement of the Charwarehouse of perithable products owned by patrons of such warehouse, and processing such products, and then removing the refrigerating agent in vapor form to reliquely it for recirculation. The term 'processing' is limited to mean such natural reactions, if any, as may result during cold storage.

4. The plaintiff operates a refrigeration system, operated by electrical energy, in which it uses a readily liquefiable fluid, i. e., anhydrous ammonia, so that the vapor can be readily condensed to a liquid with cooling water when it is compressed to a reasonable pressure, averaging about 150 pounds per square inch gauge, and when the pressure is reduced on the liquid again, say to 15 pounds gauge, it evaporates at a temperature of approximately 0° F, with the absorption of a large amount of heat. The vapor formed is drawn away from the refrigerator by the suction action of a compressor and is compressed to the condenser pressure and is here again liquefied. The ammonia continuously passes through a cycle of operation as follows: (1) the vapor from the refrigerator is compressed and cooled until it liquefies. (2) the liquid is discharged into the refrigerator at a predetermined pressure and in evaporating absorbs heat, (3) the vapor is then returned to the compressor. The temperature at which the heat is absorbed is regulated by maintaining the required pressure in the refrigerator. At 15 pounds gauge the liquid boils at about 0° F.; if the pressure is reduced to 0 pounds gauge the liquid boils at -28° F.; and if the pressure is increased to 30 nounds gauge the liquid boils at 17° F. Thus any desired refrigerator temperature can be obtained in this manner. The anhydrous ammonia is used over and over again in the cycle, and only that quantity which escapes through leaks in the system must be

replaced.

5. The plaintiff uses this anhydrous ammonia, thus compressed into a liquid:

(a) By circulating the liquid, at a predetermined pressure, through pipes and coils, placed around tanks containing water, and as the liquid evaporates into a vapor it extracts the heat from the water causing the water to become ice, (b) By circulating the liquid at various predetermined

95 C. Cls.

pressures, through pipes running under the public streets of St. Louis from plaintiff's plant to buildings located at considerable distances from such plant, in which buildings the refrigeration, thus produced by the liquid evaporating into a vapor, is used to extract the heat from cold storage boxes of produce dealers, from finking water, from the light

of buildings and theaters, etc.

(c) By circulating the liquid, at various predetermined
pressures, through pipes and coils placed in specially concernated variouses, which rooms contain perishable commodities, such as eggs, cheese, butter, meat, poultry, fish,
apples, vegetables, beer, fream fruits, frezen berries, potatoes, etc., and as the liquid evaporates into a vagor it extracted
toes, etc., and as the contain perisher resulting in their
unsurration for food purposses.

6. Many of the customers now supplied with refrigeration through the plaintiff's pipe lines, described in finding 5 (b), previously used ice for their refrigeration requirements, other customers of plaintiff having been supplied with such pipe-line refrigeration since the organization of their business.

7. The ice manufactured as described in finding 5 (a) is sold as accumulated refrigeration

8. Commodities are customarily placed in refrigerated warehouses for preservation (1) at points of origin or production of such commodities, or (2) at points of destination or consumption of such commodities, or (3) at any points located between such origin points and such destination

points.

9. The electrical energy used by the plaintiff in its refigerated warehouse operations was used by plaintiff at an intermediate stage of the passage of perishable products from the produces to the retailers who vend such products. After passing through this intermediate stage the perishable products reach the custody of the retailer who uses refrigeration service for the preservation of the perishable products used with his selling momentum.

10. As to its refrigerated warehouse operations plaintiff's dealings are with wholesalers, retailers, etc., in carloads or

Reporter's Statement of the Case

other large lots, and not with individual consumers or in lots of goods as small as are involved in transactions with individual consumers.

11. Plaintiff stores butter, eggs, poultry, fruits, pecans,

apples, fish, cheese, vegetables, and in fact all perishable food products in its wavelouse. So thutter, eggs, and poultry originate in Illinois, Kansas, Nebrasks, Iowes, California, Oregon, and Westington, and, after storage in plantiffs of the control of the

all other States east of the Mississippi River.

12. Plaintiff solicits its storage business from practically every state by direct personal contacts, solicitation by mail, and through national advertising, two of its officers traveling extensively throughout the United States soliciting such business

13. Plaintiff's refrigerated warehouse is in direct conpetition with all large refrigerated warehouses located on railroad tracks in the United States, the extent of such competition depending upon the particular commodity in question and the location of such other refrigerated warehouses, and plaintiff's rates for storage are fixed in competition with such competiting warehouses.

14. No tax on electrical energy used in refrigerated warbous operations was assessed against, or collected by the Collector of Internal Revenue from, (1) refrigerated warbouse located in the State of California, because under the with a public interest and classified as public utilities, and as such are sempeted by paragraph 60, Regulations 42, of the Bureau of Internal Revenue, relating to the electrical corrected by any state or municipality, sousse owned and operated by any state or municipality.

operated by any state or mannerpancy.

15. Railroads, as a general rule, grant transit privileges
of shipments for the temporary stoppage, handling, storage,
and processing of such perishable products at convenient

transit points en route between the points of origin and destination of shipments, and, in their filed and published tariffs designate St. Louis, Missouri, including plaintiff's warehouse in St. Louis, as one of the points entitled to such transit privileges.

16. Raliroade also provide and furnish refrigeration for and during the transportation of such periabalse products in that raliroad systems provide specially squipped refrigerant cars therefor, precod the cars, less the bunkers of the cars iced, and frequently stop the cars on route to replenish the supply of les in the bunkers. Raliroads also permit their refrigerated cars to stant while loated with such periabable therefore the refrigerated cars to stant while loated with each periabable their cold storate services.

17. The electrical energy used by plaintiff in its operations described in finding 5 was furnished and sold to plaintiff by the Union Electric Light & Power Company of St. Losis, Mosouri, through four meters, two of which were small meters for energency lighting at the main plant and the subplant, and two of which were main line meters at the main plant and the subplant. Plaintiff settinate shows a plant and the subplant. Plaintiff settinate shows an about the subplant of the subplant. Plaintiff settinate shows an about the subplant of the subplant. Plaintiff settinate shows a new subplant and two of which were main line meters at the main plant and two subplants. Plaintiff settinate shows a subplant of the subplant of th

frigerated warshouse 3,400,000 KWH

18. Plaintiff's revenues from its operations were as follows:

	Fiscal year ended April 30, 1983	Fiscal year excited April 30, 1934
Ice Department Pipe Line Department Cold Storage Revenue	\$89, 900, 55 125, 996, 99 360, 375, 61	\$89, \$89. 40 123, 362 51 254, 360. 37
Total	487, 273, 35	455, 421. 25

Ice Department revenue covers the actual sales price of ice; Pipe Line Department revenue covers the actual sales of pipe line refrigeration; and Cold Storage Revenue includes Reporter's Statement of the Case

both handling and storage charges, approximately 20% to 25% of the total being handling charges.

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19. Union Electric Light & Power Company demandel
of phismid a tsa quivalent to 5% of the amount plaintiff
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oran Jane 21, 1885, to a ngue 31, 1885, inclusive, which text,
totaling \$8,264.59, plaintiff duly paid to Union Electric
Light & Power Company as collecting agent for the Commissioner of Internal Revenue on the dates specified in paragraph 4 of the petition herein.

20. The Commissioner of Internal Revenue on July 27, 1982, in reply to a letter from Representative Carroll L. Beedy, requesting a ruling concerning the tax imposed by section 616 of the Revenue Act of 1982 on amounts paid for electrical energy by the New England Cold Storage Co., Inc., advised him in part as follows:

It is held that electrical energy consumed by the New England Cold Storage Co., Inc., in operating compressors in the manufacture of refrigeration is used for industrial consumption and that amounts paid for such energy are therefore not subject to the tax imposed by the above section [Sec. 616] of the Revenue Act of 1932.

October 3, 1932, the Commissioner wrote the New York State Association of Refrigerated Warehouses, in reference to the electrical energy tax, in part as follows:

You are advised that the question of the taxable status of electrical energy which is furnished to public cold storage warehouses has been reconsidered and the Bureau is now of the opinion that the consumption of facture of refrigeration for storage purposes is commercial in its cope, since such energy is not used in manufacturing or processing articles of commerce, and, therefore, its subject to the tax imposed by the above-

Electrical energy used in the manufacture of ice for sale is not subject to the tax if separately metered.

December 1, 1932, the Commissioner in a letter to the General Manager of St. Louis Refrigerating & Cold Storage Reporter's Statement of the Case
Co., in reference to the taxable status of electrical energy,
held as follows:

\* \* that, after a careful consideration of the facts submitted, the Bureau has reached the conclusion that electrical energy furnished to cold storage warehouses for use in the manufacture of refrigeration for storage purposes is commercial in its scope and, therefore, subject to the tax imposed by section 616 of the Revenue Act of 1932.

March 22, 1933, Deputy Commissioner R. M. Estes wrote the Collector of Internal Bevenue at St. Louis, in reference to a request from the St. Louis Refrigerating and Cold Storage Co. for a ruling in connection with the tax on electrical energy, in part as follows:

With respect to the use of electrical energy for purposes of pipeline refrigeration carried on under the authority of a franchise granted by the City of St. Louis, you are advised that this activity does not bring the company [St. Louis Refrigerating and Cold Storage Co,] within the classification of a "public utility" within the meaning and intent of internal revenue laws and regulations.

The in held, therefore, that electrical energy furnished for direct consumption by the above-named company, through a single meter, for use in the activities outlined above is for use in a business the predominant character of which is held to be commercial in its scope and, therefore, is subject to the tax imposed by section 616 of the Revenue Act of 1982.

The letters quoted in this finding are of record as Exhibits A to D, inclusive, attached to the stipulation in this case and are made a part hereof by reference.

21. On or about July 24, 1934, the plaintiff filed a claim for refund of the aforesaid taxes with the Collector of Internal Revenue at St. Louis, on the grounds that:

 Such electrical energy was not furnished to taxpayer for domestic or commercial consumption.

Such electrical energy was furnished to taxpayer for industrial consumption, and is therefore exempt from tax.

Such electrical energy was furnished to taxpayer for uses other than domestic or commercial, and is therefore exempt from tax. 694

Reporter's Statement of the Case
The claim for refund was rejected by letter of the Commissioner to plaintiff dated May 3, 1935, reading in part as follows:

It has been held by this office that the activities carried on by your company are predominantly commercial in their scope within the meaning and intent of internal revenue laws and regulations. Your claim is therefore rejected in full.

This letter is of record as Exhibit E attached to the stipulation in this case and is made a part hereof by reference.

22. No repayment of tax paid by plaintif to the Union Electric Light & Power Company, or any part thereof, has been made to plaintiff by said collecting agency, and plaintiff has not consented to the allowance of credit or refund to such agency.

23. None of the taxes so paid by the plaintiff was billed separately or otherwise passed on to its customers or patrons, but said taxes were wholly absorbed and paid by the plaintiff out of its own funds without any reimbursement therefor.

PACTS AS TO REGULATIONS, INTERPRETATION, AND ADMINISTRATION OF SECTION 616 OF THE REVENUE ACT OF 1932

1. By section 645 of the Revenue Act of 1982 approximate June 6, 1989, and effective June 19, 1982 (47 Sex. 19, 1989). Congress imposed a tax on the amount paid for electrical energy for densition or commercial consumption. Pursuant to that ext, Treasury Regulations 82, Article 49, were promising June 1992. The second of the act of the section of th

Regulations were promulgated.
The evidence shows that regulations are drafted in the Miscellaneous Tax Unit of the Bureau of Internal Revenue, subject to approval or revision by the Rules and Legislative Section of the General Counsel's Office, after which they are submitted to the General Counsel, then to the Commissioner of Internal Revenue for approval, and finally they must be

approved by the Secretary of the Treasury. Such procedure was followed in this case.

The act referred to was the first excise tax imposed by Congress on electrical energy, and therefore the Bureau of Internal Revenus had, prior thereton, no experience in administrating this type of tax. The poversions of the Regulations in the Regulations of the Regulations Treasury Decision 4942 was issued on July 98, 1982. Among there things it provided for the exemption from traxition of certain nonprofit institutions and held that electrical energy communed in any commercial phase of an industrial or other houses was taxable. Accordingly Regulations 42, Article Containing the Researy Decision 4942 include the amendments contained in Treasury Decision 4943.

2. Although the Regulations were revised several times in an effort to clarify the scope of the tax, it was and still is necessary for the Bureau to administer the act involved on the basis of individual rulings governing specific uses of electricity, resulting in numerous published and uppublished rulings covering almost every taxable use of electricity. While Regulations 42. Article 40, construe as exempt from tax the noncommercial use of electrical energy by public utilities, telegraph, telephone and radio communication companies, railroads and other common carriers, educational institutions not operated for private profit. churches, and charitable institutions, they at the same time construe the statute as meaning that the electrical energy consumed by these organizations in any commercial phase of their activities is not tax-exempt. Electrical energy is held taxable when utilized in the sales and display rooms, office buildings, retail stores, etc., operated by these organizations, where the energy is supplied from a meter not connected with their trunk lines, these activities being a commercial phase of their business. Electrical energy used by cold storage warehouses is consumed in a commercial activity, except where the warehouses are part of a railroad system, etc., or where they are used to store raw materials. This ruling applies in all states except California, whose law

Opinion of the Court holds that cold storage warehouses are public utilities. The Bureau previously held that all cold storage warehouses were tax-exempt.

3. The Treasury Department holds that the published rulings of the Bureau of Internal Revenue do not have the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary of the Treasury. Each ruling embodies the administrative application of the law and Treasury Decisions to the entire set of facts upon which a particular case rests. Unpublished rulings are not cited or relied upon by officers and employes of the Bureau as a precedent in the disposition of other cases.

The court decided that the plaintiff was not entitled to recover.

Jones, Judge, delivered the opinion of the court: Plaintiff paid taxes on electrical energy under Section 616 of the Revenue Act of 1982,1 and weeks to recover them on the

1 Sec. 616. (a) There is hereby imposed a tax equivalent to 3 per centum of the amount paid on or after the fifteenth day after the date of the ensetment of this Art, for electrical energy for demontic or commercial consumption

furnished after such date and before July 1, 1934, to be paid by the person paying for such electrical energy and to be collected by the vendor. (b) Each vendor receiving any payments specified in subsection (a) shall collect the amount of the tax imposed by such subsection from the person making such payments, and shall on or before the last day of each menth make a return, under outh, for the preceding month, and pay the taxes so collected, to the collector of the district in which his principal place of business is located, or if he has no principal place of business in the United States, to the collector at Baltimore, Maryland. Such returns shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulation prescribe. The Commissioner may extend the time for making returns and paying the taxes collected, under such rules and regulations as he shall prescribe with the approval of the Secretary, but no such extrusion shall be for more than 90 days. The provisions of sections 771 to 774, inclusive, shall, in lieu of the provisions of sections 619 to 629, inclusive, be applicable in respect of the tax imposed by this section.

(c) No tax shall be imposed under this section upon any payment received for electrical energy furnished to the United States or to any State or Turktors, or political subdivision thereof, or the District of Columbia. The right to exemption under this subsection shall be evidenced in such manner as the Commissioner with the approval of the Secretary may by regulation prescribe (47 Stat. 169, 205).

ground that the year erroneously assessed and collected.
The facts as stipulated by the respective parties are adopted as the sessnital facts of this case, with some additional findings in respect to Treasury decisions and regulations.

The issue is whether plaintiff's use of electrical energy is commercial consumption as defined in the quoted provision of the Revenue Act.

Plaintiff asserts its business is industrial or in a field between industrial and commercial and therefore without the scope of the statute. Defendant insists that the business is predominantly commercial.

Plaintiff operated a refrigerating system in the City of St. Louis. It used a fluid known as anlydrow ammonia, which could be readily liquefied, under compression, with cooling water. When the pressure was released it superized thus absorbing heat. The process of liquefaction and evaporation of the ammonia was repeated, thus making a continuous cycle of operation with the same commodity,

The striigerating system was operated by electrical energy. There were three phases to the business: (1) the manufacture and sale of rice; (2)) the manufacture, distribution and see of rufrigeration through pile lines, the refrigeration being used for cold storage boxes of produce dealers, for draining water, for the sir of buildings and other needed purposes; and (3) the refrigeration of plaintiff warr-bouse boated in various parts of the City of St. Zonis Douis Control of the City of St. Zonis Section 616 (a) of the Revenue Act of 1002 (47 Stat. 190, 2001), is as follows:

There is hereby imposed a tax equivalent to 3 per centum of the amount paid on or after the fifteenth day after the date of the enactment of this Act, for electrical energy for domestic or commercial consumption, furnished after such date and before July 1, 1384, to be paid by the person paying for such electrical energy and to be collected by the vendor.

When the framework of plaintiff's business, with all its ramifications, is laid alongside the terms of the statute, it appears to come rather clearly within the taxable provisions. The wording of the statute is very simple. It levies a tax equivalent to 3 per centum of the amount paid for electrical energy for domestic or commercial consumption.

Through its system of refrigeration the plaintiff cools the specially constructed and insulated cooling rooms in its own public refrigerated warehouses, and cools similar rooms in those of its customers in the City of St. Louis. It also manufactures ice which is sold in the St. Louis area.

Vegetables, fruits, dairy products, fish and other periable products from a number of different states are stored in the warehouses and after storage are reshipped to point in various states. Its dealings are with wholesafers and retailers dealing in carload lots and not with individual consumers. Plaintiff solids storage business from practically severy state by direct contact, by mail and through national advertision.

When the business is considered as a whole, its activities being necessarily woven together, we think it is predominantly commercial in its nature. No separate meter was maintained for the part that was industrial and there is no satisfactory showing as to the amount of electrical energy consumed in that phase of the business.

consumed in that phase of the business.

It is earnestly insisted by plaintiff that there is a zone between commerce and industry and that plaintiff's business in the main is within this twilight zone.

There is no such distinction written into the terms of the taxing provisions. The only exception named in the statutes is energy furnished the Government or political subdivisions thereof

True, Tressury Regulations 42 recognize certain named activities an either commercial nor industrial within the meaning of the act, but such regulations do not name the type of business actively involved in this case as falling between the two classifications. Besides, regulations may not serve to change the provisions of a statute.

Plaintiff insists that the intention of the Congress, as reflected in the history of the legislation, was to reach only individual consumers and the small business concerns and not users on a large scale. Opinise tax Case?

The discussions in the Congress covered a wide range. Many individual statements were made. Those are quoted in acteuor by both parties with conflicting interpretations. However, the Conference Report, which was made by a John Conference Constitute representing both the Senat and the However, the Conference Constitute representing both the Senat sold the Conference Constitute representing the three conferences constitute the following explanation of the taxing repression which is involved here:

the taxing provision which is involved here:

The House recedes with an amendment substituting a
tax of 3 percent of the price paid for electrical energy
for domestic or commercial use (as distinguished from
industrial use), to be paid by the purchaser and collected by the vendor, with necessary administrative provisions and an execution in the case of electricity
provides and are execution in the case of electricity
projects and substitution of the positive of Columpolitical subdivision thereof, or the District of Colum-

bia. [Italics supplied.]

If any ambiguity existed and any explanations were needed apart from the language of the statute, this final Joint Conference Committee Report makes it clear that it was the intention that the term 'commercial' should have a meaning broader than the restricted sense which plaintiff would have us apply. It explains that the tax applies to commercial as distinguished from industrial use. It then exempte only electrical average and to the government, as-

We may add that this seems the natural construction of the wording of the statute.

The use of the two terms by way of contrast followed by the reference to political subdivisions as the only named exemption would seem to preclude the intermediate classification which plaintiff attempts to read into the statute.

It hardly seems necessary to go behind the clear wording of the statute. Certainly is is unnecessary to go behind the Joint Conference Committee Report into the maze of discussion and interpretation by individual members of the Congress when the statute itself, which is the final product of their labors, is couched in simple language clearly expressed.

We think some of the confusion has arisen from the effort on the part of the administrative unit to establish an Distinct of the Cent intermediate field between commerce and industry. This makes the problem more difficult. Since there are no definite calls, the construction of two dividing lines instead of one is made necessary, and the extent of such field, if established, can be measured only by the somewhat varying

use of otherwise well-known words.

In the general understanding commerce and industry cover the entire business field \* and while it is sometimes difficult to know whether a border-line business falls mainly in the field of commerce or industry it is far less difficult than to attempt to establish shadowy lines. It is far less complicated to follow the generally accepted meaning of the turns which are used in the taxing status.

This conclusion is further strengthened by the wording of the Act of June 16, 1033, in which Section 60 is remember with only one charges pertaining to exemptions, namely, (48 State 24-9, 30). The inclusion of this exemption indicates the exclusion of other similar exemptions. While the Act of 1030 has no application to the period involved in the instant case, the naming of the exemption supports the conclusion that such as the condition of the period of the condition of the survey field of the strength on the period single the internediate business field for which substitute of the conclusion of the survey field for which substitute of the condition of the terrorical survey field for which substitute of the condition of the terrorical survey field for which substitute of the condition of the terrorical survey field for the condition of the condition of the condition of the survey field for the condition of the

Churches, charitable, educational, and other nonprofit institutions, as such, would not be subject to the tax, regardless of whether such field were established, since they full wholly without the realm of business.

The Commissioner of Internal Revenue has a most difficult task in interpreting the numerous taxing statutes and the many statutory changes that are necessarily made from time to time by the Congress to fit the vast and rapidly changing business structure of the country. But we must construct the language of the act as we find it.

It is contended by plaintiff that Congress after the issuance of Treasury Regulations 42 repeatedly re-enacted the tax law without substantial change in this provision, thus confirming the Commissioner's action. The contention loses much of its force in the light of the numerous rulings, decicions, and excentions that have been made necessary by the

<sup>1</sup> Jordon v. Tuskiro, 278 U. S. 123, 127-128.

complicated and widely varying nature of the many businesses affected. But if this viewpoint is accepted the fact remains that the Commissioner of Internal Revenue, who prepared the regulations, also held that plaintiff's business did not fall within the nontaxable intermediate field. It would be rather illogical to held that the Government would represent the properties of the commission of the requirement of the properties of the states are expressed in the regulations, and at the same time disregard the Commissioner's interpretation of those limits.

Even if the term 'commercial' were construed in the narrows sense for which plaintiff contends, it would not necessarily follow that it would be exempt from the tax. With the single exception of the manufacture of ice, plaintiffactivities are predominantly commercial. It seems to the commercial. It so business is primately commercial. It folties are an integral part of the current or stream of commerce. Thus, regardless of whether the Commissioner of Internal Revenue properly construed the act in undertaking by regulation to exempt certain businesses on the ground that they are neither industrial nor commercial, the plaintiffe business is subject to the tax.

It follows that plaintiff's petition must be dismissed and it is so ordered.

Madden, Judge; Whitaker, Judge; Littleton, Judge; and Whalex, Chief Justice, concur.

FULTON MARKET COLD STORAGE COMPANY v.
THE UNITED STATES

[No. 48336. Decided March 2, 1942]

On the Proofs

Excise tow on electrical energy under the Revenue Act of 1932; "commercia" consumption.—Decided upon the authority of St. Louis Refrigerating & Cold Storage Company v. The United States, ante, page 694.

The Reporter's statement of the case:

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Mr. Walter W. Ahrens for the plaintiff. Mesers. John J. Hickey and James K. Polk were on the briefs.

Mr. James K. Polk for Consolidated Edison Company of New York, Inc., as amicus curiae. Mr. Robert E. Coulson

of New York, Inc., as amicus curiae. Mr. Robert E. Coulson was on the brief. Mr. Hubert L. Will, with whom was Mr. Assistant At-

torney General Samuel O. Clark, Jr., for the defendant.

Messre. Robert N. Anderson, Fred K. Dyar and George H.

Foster were on the brief.

The court made special findings of fact as follows, upon the evidence and a stipulation of the parties:

The plaintiff, the Fulton Market Cold Storage Company, is an Illinois corporation with its office and principal place of business located in Chicago.
 The plaintiff now is, and for many years, including the

period from June 31, 1903, to August 52, 1908, inclusive, was engaged in distributing a refringening agent in liquid form through pipe lines on its premises for the purpose of in the property of the property of the property of the partons of such warshouse, and processing such products, and then removing the erfringening agent in yapor form and the removing the erfringening agent in yapor form is limited to mean such natural reactions, if any, as may result during cold storage.

during coid storage.

A. The plantist deposites as indirect performance of the control of the conference of the control of the control of the conference of the control of the control of the conference of the control of the control

Reporter's Statement of the Case liquefied. The ammonia continuously passes through a cycle of operation as follows: (1) the vapor from the refrigerator is compressed and cooled until it liquefies. (2) the liquid is discharged into the refrigerator at a predetermined pressure and in evaporating absorbs heat from the brine, (3) the vapor is then returned to the compressor. The temperature at which the heat is absorbed is regulated by maintaining the required pressure in the refrigerator. At 15 pounds gauge the liquid boils at about 0° F .: if the pressure is reduced to 0 pounds gauge, the liquid boils at -28° F .; and if the pressure is increased to 30 pounds gauge, the liquid boils at 17° F. Thus any desired refrigerator temperature can be obtained in this manner. The anhydrous ammonia is used over and over again in the cycle, and only that quantity which escapes through leaks in the system must be replaced.

4. The plaintiff use the aforementioned calcium chloric brine by circulating the brine at various prefeterance brine by circulating the brine at various prefeterance temperatures through pipes and coils placed in specially constructed and insulated rooms in plaintiff a public erigin erited variouss, which rooms contain prefainble commoliration of the property of the property of the property expendite, beer, from fruits, frome brine, pastons, etc., and as the brine circulates, its extracts the heat from these commolities resulting in their preservation for food purposes. The brine returns to the refrigerator where the acmonosities.

5. Commodities are customarily placed in refrigerated wavelouses for preservation (1) at points of origin or production of such commodities, or (2) at points of destination or consumption of such commodities, or (3) at any points located between such origin points and such destination

points.

6. The electrical energy used by the plaintiff in its refrigerated wavehouse operations was used by plaintiff at an intermediate stage of the passage of perishable products from the producers to the retailers who wend such products. After passing through this intermediate stage the perishable products reach the custedy of the retailer who uses refriger-

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710 Reporter's Statement of the Case

ation service for the preservation of the perishable products in connection with his selling operations. 7. As to its refrigerated warehouse operations plaintiff's

dealings are with wholesalers, retailers, etc., in carloads or other large lots, and not with individual consumers or in lots of goods as small as are involved in transactions with

individual consumers. S. Plaintiff stores butter, eggs, poultry, fruits, pecars, apples, fish, cheese, vegetables, and in fact all perishable food products in its warehouse. Such butter, eggs, and poultry originate in Illinois, Kansas, Nebraska, Iowa, Cal-

ifornia, Oregon, and Washington, and, after storage in plaintiff's warehouse, are reshipped to points in Indiana, Pennsylvania, New York, and in fact the entire eastern seaboard. Such fruits, pecans, apples, and many other commodities originate in Arkansas, Tennessee, Alabama,

Georgia, Louisiana, Washington, Oregon, Idaho, and other states, and, after storage in plaintiff's warehouse, are reshipped to points in all other states east of the Mississippi River 9. Plaintiff solicits its storage business from practically

every state by direct personal contacts, solicitation by mail. and through national advertising, two of its officers or solicitors traveling extensively throughout the United States soliciting such business. 10. Plaintiff's refrigerated warehouse is in direct competition with all large refrigerated warehouses located on rail-

road tracks in the United States, the extent of such comnetition depending upon the particular commodity in question and the location of such other refrigerated warehouses. and plaintiff's rates for storage are fixed in competition with such competing warehouses.

11. No tax on electrical energy used in refrigerated warehouse operations was assessed against, or collected by the Collector of Internal Revenue from, (1) refrigerated warehouses located in the State of California, because under

the laws of California such warehouses are deemed to be affected with a public interest and classified as public utilities, and as such are exempted by paragraph 40. Regulations 42, of the Bureau of Internal Revenue, relating to the elecproducts reach the custody of the retailer who uses refrigertrical energy tax, and (2) refrigerated warehouses owned and operated by any state or municipality.

12. Railroads, as a general rule, grant transit privileges on shipments for the temporary stoppage, handling, storage, and processing of such perishable products at convenient transit points or origin and destination of shipments, and, in their filed and published startiffs, designate Chicage, including plaintiff's warehouse in that city as one of the points entitled to such transit mrivileges.

13. Railroada sloe provide and furnish refrigeration for and during the transportation of such perishable products, in that railroad systems provide specially equipped refrigar or cars therefore, prescoil the cars, keep the bunker, provide specially equipped refrigar of the cars lood, and frequently stop the cars on route to repetable the supply of ice in the bunkers. Railroads also perishable product, at transit points and destination, thus augmenting their cold dorsage services.

14. The electrical energy used by plaintiff in its operations described in finding 4 was furnished and sold to plaintiff by the Commonwealth Edison Company of Chicago, Illinois.
15. On or about April 5, 1935, the Collector of Internal

Revenue for the First District of Illinois demanded of plaintiff a tax equivalent to 3% of the amount plaintiff paid for electrical energy consumed by it during the period from June 21, 1982, to August 31, 1933, inclusive, which tax, totaling 886.31, plaintiff duly paid, under protest, to said Collector of Internal Revenue for the First District of Illinois on or about April 13, 1985.

16. August 22, 1935, the plaintiff filed a claim for refund of the aforesaid taxes with the Collector of Internal Revenue for the First District of Illinois, at Chicago, on the grounds that:

 Such electrical energy was not furnished to taxpayer for domestic or commercial consumption.
 Such electrical energy was furnished to taxpayer for industrial consumption, and is therefore exempt from tax.

## FULTON MARKET COLD STORAGE COMPANY

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Reporter's Statement of the Case 3. Such electrical energy was furnished to taxpayer for uses other than domestic or commercial, and is therefore exempt from tax.

The said claim was rejected by letter of the Commissioner to plaintiff, dated November 1, 1935, reading in part as

This office has consistently held that electrical energy consumed in operating compressors in the manufacturing of refrigeration for cold storage purposes is not used in manufacturing or processing of articles of commerce and that the business is commercial in scope and subject

to tax. Your claim is therefore rejected in full. This letter is of record as Exhibit A attached to the stipulation herein and is made a part hereof by reference.

17. No repayment of tax paid by plaintiff to the Collector of Internal Revenue for the First District of Illinois, or any part thereof, has been made to plaintiff.

18. No part of the tax so paid by the plaintiff was billed separately or was otherwise passed on to its customers or natrons, but said tax was wholly absorbed and naid by plaintiff out of its own funds without any reimbursement therefor.

19. FACTS AS TO REGULATIONS, INTERPRETATION, AND ADMINIS-TRATION OF SECTION 616 OF THE REVENUE ACT OF 1932

1. By section 616 of the Revenue Act of 1982, approved June 6, 1932, and effective June 21, 1932 (47 Stat. 169, 266), Congress imposed a tax on the amount paid for electrical energy for domestic or commercial consumption. Pursuant to that act, Treasury Regulations 42, Article 40, were promulgated June 17, 1932, eleven days after approval of the act. They were drafted under pressure, and since it was necessary to draft regulations covering other features of the act at the same time, the draftsmen in the Bureau of Internal Revenue were required to work practically every night from June 6, the date the act was approved, to June 17, when the Regulations were promulgated.

The evidence shows that regulations are drafted in the Miscellaneous Tax Unit of the Bureau of Internal Revenue. subject to approval or revision by the Rules and Legislative Section of the General Counsel's Office, after which they are submitted to the General Counsel, then to the Commissioner of Internal Revenue for approval, and finally they must be approved by the Secretary of the Treasury. Such procedure was followed in this case.

The act referred to was the first excise tax imposed by Congress on selectrical energy, and therefore the Bureau of Internal Revenue had, prior thereto, no experience in administrating this type of their attention, the control of t

2. Although the Regulations were revised several times in an effort to clarify the scope of the tax, it was and still is necessary for the Bureau to administer the act involved on the basis of individual rulines governing specific uses of electricity, resulting in numerous published and unpublished rulings covering almost every taxable use of electricity. While Regulations 42, Article 40, construe as exempt from tax the noncommercial use of electrical energy by public utilities, telegraph, telephone, and radio communication comnanies, railroads and other common carriers, educational institutions not operated for private profit, churches, and charitable institutions, they at the same time construe the statute as meaning that the electrical energy consumed by these organizations in any commercial phase of their activities is not tax-exempt. Electrical energy is held taxable when utilized in the sales and display rooms, office buildings, retail stores, etc., operated by these organizations, where the energy is supplied from a meter not connected with

their trusk lines, these activities being a commercial phase of their business. Electrical energy used by cold storage warehouses is consumed in a commercial activity, eccept where the varsbounces are part of a railroad system, etc., or where they are used to store raw materials. This ruling applies in all states eccept California, whose law holds that cold actorage warehouses are public utilizing, whose law holds that cold actorage warehouses are public utilizes. The Bureau exempt.

8. The Treasury Department holds that the published ruling of the Burras of Internal Revenue of not have the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary of the Treasury. Each ruling embodies the administrative application of the law and Treasury Decisions to the entire set of facts upon which a particular care rests. Unpublished rulings are not clted or relied upon by officers and smployes of the Bursau as a precedent in the disposition of other forces.

The court decided that the plaintiff was not entitled to recover.

Opinion per curiam:

The material facts in this case are substantially the same as the facts in St. Louis Refrigerating & Cold Storage Company, No. 43110, decided this day. The question presented is the same.

Upon the facts disclosed and for the reasons set forth in St. Louis Refrigerating & Cold Storage Company v. The United States, supra, the court is of the opinion that the plaintiff is not entitled to recover, and the petition is theretony dismission.

It is so ordered.

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# Reporter's Statement of the Case ARTHUR A. AGETON v. THE UNITED STATES [No. 43970. Decided March 2, 1942]

#### [Mg. 45870. Decided march 2, 1942]

## On the Proofs

Pay and alloconous; licutement in Navy with dependent mother; restst alloconous while on sea duty.—Where plaintiff, a licutenant in the United States Navy, with a dependent mother, while on sea duty was given no allowance as rental for quarters; it is shelf tasp plaintiff is settlited to recover the full restal allowance for an officer of his rank with dependents for the period involved.

Bone; insufficient allowance.—Where plaintiff, a lieutenant in the United States Kavy, with a dependent mother, was under the status entitled to every prior rooms to flower-much quarters; the property of the state of the state of the state of the state has own occupacy with no allowance; it is held that for the period of such occupancy plaintiff is sentitled to recover for the three additional rooms to which he was otherwise entitled, all at the monetary value fixed by Predefortal order.

all at the monetary value fixed by Presidential order.

Same; administrative interpretation.—The long-continued interpretation by administrative officials of an act, which in the meantime is reenacted by the Congress, is evidence of its proper
construction.

The Reporter's statement of the case:

Mr. Fred W. Shields for plaintiff. King & King were on the briefs.

Mr. L. R. Mehlinger, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant.

#### The court made special findings of fact as follows:

1. Plaintiff, Arthur A. Ageton, was appointed a midship-man on August 25, 1919, was commissioned an ensign from June 8, 1928, lieutenant (junior grade) from June 8, 1928, and lieutenant from October 1, 1930, under which appointment he was serving on active duty at all times here

involved.

2. Plaintiff's mother, Minnie D. Ageton, is more than 69 years of age. She resides permanently at 216 Second and Olive Streets, Long Beach, California. Her husband, Peter Benjamin Ageton, died on October 19, 1919, leaving her a bouss, valued at about \$20,00 and \$2,000 in insurance. Both

RESPITED STATEMENT OF THE CASE
the house and the proceeds of his insurance were disposed
of by Mrs. Ageton long prior to May 1, 1982, and on that
date she owned no real or personal property aside from her
small personal belongings.
3. Plaintiff's mother lived with him from September 1,

1890, to April 98, 1932. On that date she was seriously inirred in an automobile societien in Washington, D. C., and was taken to Emergency Hospital, where she reminized until May 10, 1892, when she was transferred to Columbia Women's Hospital, where she stayed until the latter part of Novumber 1982. After her discharge from the last-named hospital she moved to New Orleans, Lonistans, where the when the lather untrinstance.

4. While plaintiffs mother resided with him, he gave her about \$90 a month which was credited to her account in the Pullman State Bank, Pullman, Washington, in addition to small amounts in cash from time to time. He also provided her with food, clothes, and shelter, the reasonable value of all of his contributions to her being about \$50 per month.

all of his contributions to her being about 900 per month.

In July 1932 plaintiff increased to \$40 a month the sum
which he credited to his mother's account each month in the
Pullman State Bank. He continued to credit this sum to

butions to the support of his mother and had at one time borrowed \$100 from her, which money he repaid during the

period covered by this claim.

 While plaintiff's mother was receiving treatment in the hospitals from April 25, 1832, to about December 15, 1832, she incurred hospital and medical expenses amounting to about \$1.160.

Plaintiff assumed payment of \$585 of these expenses; his

brother Richard contributed \$200 towards such expenses, and a cab company gave \$375 to the mother in full settlement of its liability for her accident, which sum was applied toward the payment of her medical and hospital expenses. Plaintiff in addition bought her such gifts as a radio, an electric fan, hospital supplies, etc.

7. While his mother was living in New Orleans, plaintiff continued to contribute \$40 each month to her. This sum and the \$25 which his brother Richard contributed each month to her were her sole income.

She paid \$35 a month for rent and used the remaining \$30 to pay her other incidental living expenses. During this period she purchased no clothing whatever. The two principal items of her living expenses consisted of her rent and the cost of her food.

8. Plaintiff's mother had no income other than the contributions made to her by the plaintiff and her son Richard. She was not gainfully employed at any time and on account of her poor health and age was unable to hold or to seek employment.

9. Plaintiff was married on November 24, 1933.

10. From July 5, 1989, to September 16, 1982, plaintiff was assigned to duty at the Battle Force Games; School, San Diego, California, and was assigned to and compiled guarters consisting of one small part of the property of the control of the

11. During those times when he was neither assigned to public quarters nor on sea duty, plaintiff was paid the rental allowance of an officer of his status without dependents. During the period May 1, 1932, to November 24, 1933. 718 Oninion of the Court

plaintiff was paid the subsistence allowance of an officer

without dependents.

12. The difference between the rental allowances of an officer of plaintiff's grade and length of service without dependents and those of an officer of his grade and length of service with dependents, for the period May 1, 1929, through November 29, 1808, in the sum of \$2,007.38. On additional subsistence allowance for the period amounts to \$250.08. Including the subsidiary of \$1,007.39. Which has not been paid helitiff.

The court decided that the plaintiff was entitled to recover.

GREEN, Judge, delivered the opinion of the court:

The plaintiff, who is a Lieutenant in the United States Navy, brings this suit to recover rental and subsistence allowances which he claims are due him from the Government for the period from May 1, 1982, to November 24, 1983.

The defendant now concedes that the avidence shows that the plaintiff had a dependent mother during the period covered by his claim, and there is no dispute as to the other material facts in the case. The controversy is as to the amount due the plaintiff

Part of the period involved as shown by the findings the plaintiff was assigned and occupied a room in the bachelor quarters of the Government. This room was provided with bath and was located at the Naval Air Station at Coronado, California. Plaintiff's mother did not at any time during the period involved occury Government ounsters.

During the time that plaintiff was neither assigned to publicaters nor on sea duty, plaintiff was paid the rostal allowance of an officer of his status without dependents. During the period of May 1, 1929, to December 24, 1939, plaintiff was paid the subsistence allowance of an officer of his status without dependents. Plaintiff claims to be entitled to the full allowance for the nerical involved and seeks

to recover the balance due him accordingly.

Plaintiff bases his claim to full rental allowance under provisions of section 2 of the Act of May 31, 1924, 43 Stat. 250, amending section 6 of the Act of June 10, 1992. This

statute has been reenacted in the United States Code but no change has been made in the wording thereof although the sections have been renumbered so that section 6 has now become section 10.

The determination of the case depends upon the construction given to that portion of the Act which reads as follows:

SEC. 2. That section 6 of said Act be, and the same is hereby, amended to read as follows: SEC. 6. Except as otherwise provided in the fourth

Stc. 6. Except as otherwise provided in the fourth paragraph of this section, each commissioned officer below the grade of brigadier general or its equivalent, in any of the services mentioned in the title of this Act, while either on active duty pay shall be entitled at all times to a money allowance for rental of quarters. \* \* \*

No rental allowance shall accrue to an offece, having on dependents, while he is on field or sea duty, nor while an officer with or without dependents is assigned rooms provided by law for an officer of his rank or a less number of rooms in any particular case wherein in the judgment of competent superior authority of the many control of the provided of the competence of the adequate for the occupancy of the officer and his dependents.

The last paragraph quoted above is the fourth paragraph of section 6.

This court has in many decisions with reference to allowances made to Naval officers announced principles which are inconsistent with the construction of the statute contended for by plaintiff, and which would deny him a full allow-

ance under the circumstances shown in the findings.

The court is now, however, informed for the first time that

The court is now, however, informed to the inst unto task to Comptouler (elements). Office, has uniformly and contended to the control of t Opinion of the Court

must have arisen on very numerous occasions since, and a large number of officers paid accordingly. The rule is so well established that the long continued practice of adminirative officials who were called upon to administe the Act-(especially when in the meantime, it has been reenacted) is evidence of its proper construction and acquirements by the legislative body therein, that we need to make no citation of authorities.

While this rule is not in accord with principles laid down by this court in prior decisions with reference to allowances to Naval officers, this court has never passed upon the precise point here involved nor even considered the effect of the amendments made by the Act of 1924.

We are therefore of the opinion that the administrative practice must prevail and plaintiff given the full allowance during the period he was on sea duty.

The determination of what plaintiff's allowance should be during the period when he occupied Government quarteer presents a very different question. The plaintiff claims he is entitled to the full allowance for this period also. It is obvious that such a ruling would give him five rooms, one of which he occupied, and four for which he would be paid; but such a holding would be in direct conflict with the provisions of the statute which fixed the number of rooms to which he was entitled at four and we must contract the statute as whole. The portion of the statute upon which a statute as who. The portion of the statute upon which are the provisions.

Under such circumstances, a reasonable construction should be given to the statute and we do not think it could have been intended by Congress that an officer should be given a room which he occupies, and at the same time be paid for it, especially when such a holding would conflict with other provisions of the statute.

We therefore conclude that this part of the case should be decided in conformity with our opinions previously rendered and that the plaintiff should be charged with the room he occupied in Government quarters for the period of such occupancy and reimbursed for the three rooms to which he was otherwise entitled, all at the monetary value fixed by presidential order. While the rule applied may not work out with perfect equity in all cases, we think that it is the fairest that can be made.

Entry of judgment will be deferred until the incoming of a report from the General Accounting Office showing the balance due plaintiff computed in accordance with the findings and this opinion. When this is determined, judgment will be rendered in plaintiff's favor accordingly.

will be rendered in plaintiff's favor accordingly. Whaley, Chief Justice, concurs.

# JONES, Judge, concurring:

I concur in the result on the ground that, while the plaintif is entitled to a situatory allowance equivalent to the fixed value of four rooms, the value of the one room actually assigned and used should be treated as a partial allottomet or part payment of the statutory obligation. While divided living quarters may not be equivalent to complete undivided quarters, the swarding of the full allowance for four rooms without any deduction for the one room actually assigned and used would amount to more than the statutory allowance.

Madden, Judge, dissenting in part:

I do not agree with that part of the decision and opinion of the court which disallows plaintiff's claim for the period during which he occupied bachelor quarters.

The applicable statute is Section 6 of the Act of June 10, 1922, as amended by Section 2 of the Act of May 31, 1994. (43 Stat. 250, 87 U. S. C. A., sec. 10.) The first paragraph of that section is as follows:

Except as otherwise provided in the fourth paragraph of this section, sech commissioned office below the grade of brigadier general or its equivalent, in any of the service, and the second of the section of the secti

#### Opinion of the Court

nished by the Secretary of Labor showing the cests of rents for the calendar year 1922. Such rate for one room is hereby fixed at \$20 per month for the fiscal year 1928, and this rate shall be the maximum and shall be used by the President as the standard in fixing the same or lower rates for subsequent years.

The second and third paragraphs specify the number of rooms, or corresponding allowance, to which officers of different ranks are entitled. The fourth paragraph is as follows:

No rental allowance shall secrue to an officer, having no dependents, while he is on field or sax duty, nor while an officer with or without dependents is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank or a less number of rooms an any particular case wherein, in the judgement of the property of the prop

The fifth paragraph of the section authorizes the President to make regulations in execution of the provisions of the section.

In reporting the bill which contained the section enacted and referred to above, the Committee on Military Affairs of the House of Representatives said of the section:

The second section of the bill is a redraft of section 6 of the pay readjustment act relating to money allowance for rental of quarters in order to make clear the import and uniform the application of the same. The textual arrangement and scheme of the section as a whole has been much improved by including and combining all the exclusionary provisions affecting rental allowance in a single paragraph. This paragraph is preceded by three paragraphs containing the express grant of rental allowance, certain and unconditional in nature except as conditioned by aforesaid exclusionary provisions of the fourth paragraph, as conclusively appears from the initial clause of the redrafted section, reading "Except as otherwise provided in the fourth paragraph of this section." The effect of this is to simplify the meaning and administration of this section by securing to all officers drawing pay-period

<sup>1</sup> House Report No. 236, 68th Cong., let Seas.

pay the corresponding rental allowance which the section creates and which cases to accrue only in the circumstances specified in the fourth paragraph thereof.

That the language of the existing section, as reflecting the legislative intent in this nature, has proved unsatificatory and should not longer be allowed to stand is the conclusion of your consulter forms a consultation and the Comptroller General Lineau, C. Comptroller, C. Comptrolle

The decisions of the Comptroller General cited in the report showed that it had been necessary for the departments to submit many questions to the Comptroller General concerning the 1922 act.

The language of the amended statute and the congressional intent as shown by the committee report show that the purpose of the Congress was to "simplify the meaning and administration" of the rental allowance statute, by expressly granting to each officer an allowance "statute, by expressly granting to each officer an allowance "statute, by expressing partial properties of the fourth paragraph," and "which causes to accrue only in the circumstances specified in the fourth paragraph," a ""."

The fourth paragraph of the section, quoted above, has no application to plaintiffs intained. He was not an office "having no dependents." He was not an office "saigned as quarters at his permanent station the number of rooms provided by law for an office of his rank " \* "." He was entitled to four rooms and was assigned one. No discussion of the contract of the c

Plaintiff's case, then, seems to be within the provisions of the statute granting a four-room rental allowance, and not within the exclusionary provisions. The court nevertheless has held that for a part of the period in question, plaintiff should not receive the full statutory allowance, but oneOpinion of the Court
fourth less, or an allowance for three rooms, because during
that part of the period plaintiff had a room in public quarters. The basis for the court's holding apparently is that

that part of the period planniif had a room in public quarfers. The basis for the court's holding apparently is that the rental allowance is a reimbursement for expenses incurred, and since planniif has been saved the expense of one room by having a room in public quarters, his allowance should be reduced accordingly.

I disagree for two reasons. First, it seems to me to be directly in the teeth of the statute, the meaning of which is further pointed with unusual clarity by the Committee report. Second, as a doctrine of offsets invented by the court to put equity in the statute, it is not supportable because it is unfair.

The statute, particularly in view of the accompanying committee report, seems to me to be clear in its purpose. It provides for money allowances for rental of quarters, fixes the number of rooms to which officers of the several ranks shall be entitled, and sets the money value of each room, Then in the fourth paragraph of Section 6 it provides that no rental allowance should accrue to officers in certain circumstances. One of those is that he be an officer without depend. ents while on sea duty. Plaintiff was an officer with dependents while on sea duty. He did not come within the exclusionary language, and the court so holds and gives him his allowance for his time on board ship. The other situation in which an officer is excluded from the statutory allowance is that he be "an officer with or without dependents \* \* \* assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank or a less number of rooms in any particular case wherein, in the judgment of competent superior authority of the service concerned, a less number of rooms would be adequate for the occupancy of the officer and his dependents." Again plaintiff does not come within the exclusionary language, as both parties readily concede. Yet the court holds that plaintiff, on this count, does not get the money allowance provided in the earlier paragraphs of the section, but a part of it. Here the court, I think, is entitled to credit for invention. There is not a syllable in the statute, which was intended by its draftsmen "to make clear the import and uniform the applicaOpinion I to Cast to C

No reason is given in the opinion of the court for giving plaintiff his full allowance while no hoord ship but desioning a part of it while on shore scope that as to the former situation the Comptroller General in numberous rulings has some that the court concedes that there is no logical difference between the two situations. The opinion of the court concedes that there is no logical difference between the two situations, the court is the court of the court concedes that there is no logical difference between the two situations are provided to rule, when the coasion raises, that one situated as plaintiff is shall have his full allowance. The court in this case rules to the countrary. Yet the Committee's purpose in ameding the act was "to make clear the import and uniform the application of the same." [Italies supplied.]

As to the equity of the defendant's position, there is no verdence that an office with dependent entitled to four rooms can maintain his dependent at one place in three rooms or the result of the properties of the place of the place three fourths the result of four-room partners. Experience is to the contrary. If in fact he rents quarters for his depend and with the remaining three-fourth of hir rental allowance, he does the same in another. He and they will, therefore, be penalized, either financially it he provides them with adequate quarters, or in their standard of living if he provides them with what he can age for the remaining protion of the allowtimed at a post where official living quarters for officers' families are not available.

Judge Littleton authorizes me to say that he concurs in this opinion.

## 729 Reparter's Statement of the Case

SCHROEDER BESSE OYSTER COMPANY, INC., GUSTAV J. SCHROEDER, ERNEST A. BESSE, FRANK W. SHERMAN v. THE UNITED STATES

[No. 43988. Decided March 2, 1942]

On the Proofs

Damages for destruction of opsitres and opsitre bods by dredging operations; Ricers and Harbors Act of 1955.—Where it is established by uncontradicted evidence that platiditis, opsiers growers in Joneta Bay, Mains, suffered dumages as a result of dredging operations conducted by the Government in the timprovement of the Cape Cot Canal; it is held that platifities are entitled to recover under the provisions of section 13 of the Rivers and Barbors Act of 1955, 46 Stata 1955.

Same; Goormsone's liability admitted.—Under the terms of the Rivers and Bathorn Act of 1985 the Goorement not only great plaintiffs the right to sue for damages but admitted its liability for all damages resulting to oyster growers "from desdigned, operations and use of other machinery and equipment" for naking such improvements. Sames; not successary to prove negligence.—Under the terms of national nations to necessary to prove negligence.—Such or the terms of national to the proven negligence.

pany v. United States, 78 C. Cls. 810 cited. Monafield v. United States, et al., 94 C. Cls. 397-440, distinguished. Same: speculative demages.—Speculative damages are not allowable

The Reporter's statement of the case;

under the said set.

Mr. Ira L. Ewers for the plaintiffs. Messrs. John F. Rich and Thomas H. Bilodeau and Burns and Brandon were on

the briefs.

Mr. Elihu Schott, with whom was Mr. Assistant Attorney
General Francis M. Shea, for the defendant.

The court made special findings of fact as follows:

1. This suit was instituted under Section 13 of the act of August 30, 1935, 49 Stat. 1028, 1049, which reads:

SEC. 13. That the Court of Claims shall have jurisdiction to hear and determine claims for damages to oyster growers upon private or leased lands or bottoms arising from dredging operations and use of other ma-

Reporter's Statement of the Case improvements:

Provided, That suits that leads the instituted within one year after such operations shall be instituted within one year.

The petition herein was filed June 11, 1938.

2. Schroeder Besso Dyster Company, Inc., one of the plainiffs herein, in a domestic corporation of the Commonwealth of Massachusetts, and for many years has been successfully engaged in the basiness of growing opters and seed opters and properties of the properties of the control of the stern, and shellfulth. The other plaintiffs, Gustav J. Schroeder, Ernest A. Beens, and Frank W. Sherman, are citizens of the United States and stockholders of Schroeder Besso Oyster Co., Inc.

The individuals, Gustay J. Schroeder, Ernest A. Besse, and Frank W. Sheman, during the time herein involved, hald licenses from the Board of Selectmen, Town of Warnsham, by long-established custom renewable to the license or his local successor in interest for 10-year periods, to plant, grow, and dig oysters, below mean low-water mark, in certain lots in Onset Bay, near the Cape Cod Canal, which they held to the use and benefit of Schroeder Besse (York Co., Inc., is the 10-10 of the Cape Cod Canal, which they held to the use and benefit of Schroeder Besse (York Co., Inc., is the 10-10 of the Cape Cod Canal, which they held to the use and benefit of Schroeder Besse (York Co., Inc., is the 10-10 of the Cape Cod Canal, which they held to the use and benefit of Schroeder Besse (York Co., Inc., is the 10-10 of the 10-

Permanent destruction as oyster beds by adjacent Government dredging is claimed of the following lots, the several



The location of the various lots with reference to each other and surrounding territory, including Cape Cod Canal and its channel into Buzzards Bay, is indicated on a map Reporter's Statement of the Case

which is in evidence as plaintiffs' Exhibit No. 28 and made part hereof by reference.

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3. Under the act of August 30, 1935, 49 Stat. 1928, 1929, the War Department in 1935 underbook the improvement of Cape God Canal set forth in the act and Rivers and Harbors Committee Document No. 15, 74th Congress, 1st Session, and continued work thereon in the years 1936, 1937, and 1938. In this improvement there were the following dredging

In this improvement there were the following dredging operations:

Job No. 37-28.—Dredging operations were conducted by the Deader of the conducted by the Cond

Job No. 37-28.—Dredging operations were conducted by the Dredge Green, a dipper-type dredge, and the Dredge Bay State No. 10, a clam-shell type of dredge. These dredges worked on the section of the canal approach extending from Station 428 to Station 820. Station numbers and other data are indicated on the map which is a part of joint Exhibit No. 1 and made eart hereof by preference.

The Bay State No. D designed from September 4, 1983, to January 3, 1983, and by the litter data had removed a total of 200,98.7 chiele yards of sund, gravel, mud, sitt, and boulders. The Bay State 19, 19 was saistited in these operation by three tugboats, six dump rows, one hanch, and one quarterized. The transport began designing on August 24, 1983, and by May 25, 1986, when work on this job ceased, had removed 1,388,1843 chiele yards of sand, gravel, 64, yard, 3 "Arghan, and rock. The Great was assisted in these operation, by twe tugboats, three dump rows, and one sund. The total removed pages are supposed to the property of the supposed pages and the property of the property

material renored on this job was 2,069,574 cubic yards.  $\lambda \sim b \cdot S^{-2} \sim D - \text{coeffing}$  operations were conducted by the Dredge Delever, a claim-shell type of deedge, and the Dredge Ton September 7, 1935, to November 13, 1936, between Station 299 and Station 530 of the casal and in this period renored at 104 of 150,193 cubic yards of and and mod. The Delever commenced diredging at Station 530 on September 9, 1958, and model at Station 500 on Stoymen ber 7, 1958, and smell at Station 500 on November 13, 1950.

tugboats, two dump scows, two launches, and one water boat.
The Toledo III dredged from August 19, 1935, to July 1,
1936, between Station 530 and Station 670 of the canal and in
this period removed a total of 1.887,909,9 cubic vards of sand.

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clay, mud, hardpan, and boulders. The Toledo III began dredging at Station 670 on August 19, 1935, and ended at Station 532 on July 1, 1936. The Toledo III was assisted in these operations by four tugboats, three dump scows, and three launches.

1, 1936, at Station 460 of the canal by the Dredge Crest, which dredged northeasterly to Station 445. From July 17 to August 12, 1936, the Crest worked on Onset Channel from Station 0 to Station 48, dredging a channel 100 feet in width. The Crest then began to dredge at Station 445 and worked easterly until September 17, 1937, when work on this job was discontinued at Station 425 to permit the Crest to dredge elsewhere. The Crest was assisted in these operations by seven tugboats, three dump scows, and two launches. The Dredge Bay State No. 4, a clam-shell type of dredge, dredged from September 14, 1936, to October 28, 1936, on the Hog Island Channel of the canal, working between Station 455 and Station 468. The Bay State No. 4 was assisted by four turboats, two dump scows, one launch, one water boat, and one quarterboat. In the periods noted above in this paragraph these two dredges removed a total of 2,727,300 cubic yards of sand, gravel, clay, mud, hardpan, and rock. The Dredge Governor Warfield, a dipper type of dredge, dredged from Station 4 to Station 11 of Onset Channel on August 11, 12, and 13, 1938.

Reporter's Statement of the Case Job 37-49 .- Dredging operations were conducted by the Dredge Pittsburg, which was assisted by two tugboats, two derrick barges, and four barges. The Pittsburg dredged from May 17, 1937, to July 20, 1937, between Station 429 and Station 472. From May 17, 1937, to June 1, 1937, this dredge worked in the West Mooring Basin, on the south side of the canal, commencing to dredge at Station 440 and ending at Station 458. This dredge was then moved to the north side of the main canal, where it worked until June 18, 1937, commencing at Station 446 and ending at Station 479. On June 18, 1937, the Pittsburg resumed dredging operations in the West Mooring Basin and completed the work on this ion in that part of the canal on July 20, 1937, at Station 457. The West Mooring Basin is indicated on the map in joint Exhibit No. 1 by the bulge on the south side of the canal between Station 430 and Station 470. The Pittsburg, during the period noted in this paragraph, removed on this job a total of 1.472.878 cubic vards of sand, gravel, mud. stone. and silt.

Dredge Crest, which was assisted by three tugboats, two dump scows, and two launches. This dredge removed shoals in the West Mooring Basin, in the vicinity of Station 463. from September 17, 1937, to October 13, 1937. On the latter date the Crest was moved to Station 542, on the northerly side of the Hog Island Channel of the canal, where work was begun, advancing in a northeasterly direction. The work on this job was completed at Station 417 on February 7. 1938. During this period this dredge worked between Station 413 and Station 542 and removed a total of 649,177 cubic yards of sand, gravel, mud, clay, hardpan, and rock. From May 1936 to April 28, 1937, the Dredge Minouas. a scagoing hopper type of dredge, did maintenance dredging at various points in the old ship channel, covering the area

Job 57-50.-Dredging operations were conducted by the

between Station 400 and Station 590. In this period this dredge removed 286,255 cubic vards of miscellaneous material, which was dumped in Buzzards Bay near Abiel's Ledge, about three miles from the entrance to Onset Bay,

The materials removed on Jobs 37-28, 37-29, 37-40, and 449978-42-CC-vol 95-48

Reporter's Statement of the Case
37-50 were carried by dump scows to a point in Buzzards
Bay about ten miles from the entrance to Onset Bay. The

materials removed on job 37-38 were deposited southwesterly of Stony Point to form the Stony Point Dike. The materials removed on job 37-49 were used to construct the Hog Island and Mashnee Island Dikes.

The U. S. seagoing Dredge Minquas was engaged in maintenance work on the canal during the period July 29, 1386, to June 16, 1395, inclusive, 202 scattered days between Stations 370 and 540. The Minquas was a small suction hopper direder.

dredge.

All these dredging operations were conducted without advance notice to the plaintiffs.

advance notice to the plaintiffs.

4. The dredging operations described in Finding 3 caused mud and silt to be deposited on plaintiff oyster beds, known as bot or grants 17, 18, 19, 30, 21, 39, and 37, a total of 273 acres, not theretofore present, in such quantity as permanently to describ their uses for the propagation or permanently of describ their uses in the plaintiff, growing, and digging of operations of the plaintiffs. Sptember 27, 1030. The use granted by the licenses had a fair and reasonable value to the soft of the plaintiffs. Sptember 27, 1030. The use granted by the licenses had a fair and reasonable value to the one by agreement entitled to its benefits, of \$70 per acre, has rod options, as of about the time the optive beds were destroyed options.

as such by the dredging operations, a total for the 37.3 acres of \$1,911.00.

5. Mud and silt drifting in from the dredging operations destroyed mature oysters that had been planted by the plaintiffs in their ovster beds.

On lots 19, 20, 21, 28, 28, 38, and 37 there would have normally matured, ready for harvest, had there not been deposited mud and silt, 5,960 bushels, more or less. Plaintifs harvested on these lots 2,128 bushels, of which shout 14,86 bushels were alive and marketable, he remainder dad. Due to the modely condition of the beds and the high proportion of dead options brought to the surface, further dad or necessarily shandoned overtees. The fair market Reporter's Statement of the Case

value of live oysters in these lots, at time and place of the harvest, was \$1.96 per bushel, a loss on 2,476 bushels of \$4,852.96. On lots 17 and 18 there would have normally matured,

ready for harvest, had there not been deposited must assist, \$1.00 bushes, more or less. Plantiffs harvested on thes lots 1,037 bushes, of which about \$6.13 bushes were alive a more analysis of the heady of the he

6. On some of plaintiffe' lots were "seed-catching bars." These bars were peculiarly adapted to the propagation of oysters in the course of which the fertilized spawn or spat settles in the water and becomes attached to a clean object where it matures. These objects are known as cutch and shells were used as such by the plaintiffs, which is common larger.

Plaintiffs' seed-catching bars wers located, two on lot 43, one on lot 23 and 48, and one on lot 43, in the year 1893, 1996, and 1987. They had been on lot 23 and 81, in the years 1893, 1996, and 1987. They had been carefully prepared and the ground surface kept at about mean low tide so that they would be in and out of water with the tides. This made for a larger set as the spats had time to become adhered more closely to the shell when the shell was exceeded to the sir.

During 1938 and 1937 plaintiffs lost sets on these bars due to the muddying of the waters by drifting in from the Government's above-described dredging operations. In 1936, plaintiffs planted shells for catching sets on lots and in smooth's as follows:

Lot:

21 23 and 24 24 24 25 26 27 28 28 28 28 28 28 28 28 28 28 28 28 28	3,000
28	1,500
46	8, 600
Total	9, 100

Reporter's Statement of the Case

In 1937 plaintiffs planted shells for catching sets on lots and in amounts as follows:

The combined planting for these two years was 17,175 ushels. The fair market value of shells with sets on them, in 1868 and 1967, ready for market, was 50 cents per bushel in and around Onset Bay, with allowance for handling and shrinkage. The reasonable value of the shells in the beds without seeds on them was 10 cents per bushel which on 17,175 bushels amounts to \$1,175.50.

7. In conducting their operations plaintiffs used proper care in keeping their damages to a minimum.

8. In September of 1988 Schroeder Besse Oyster Co., Inc., advised the district engineer, U. S. Engineer Office, War Department, Boston, Mass., of damage being suffered by their business and property through the Government's dredging operations, and on September 28, 1878, submitted to the district engineer a claim for damages in the sum of 137,490.00, exclusive of value of errounds, status:

In all cases we are placing our claims at the Jowest figure possible. We are not placing say claims for damages to our grounds. This damage, consists of about suffered to the control of the control of

On May 3, 1938, the district engineer informed the oyster company that the War Department did not have jurisdiction of the claim, and referred the company to Section 13 of the act of August 30, 1938, whereupon this suit was instituted. The court decided that the plaintiff was entitled to recover.

Whalmy, Chief Justics, delivered the opinion of the court:
The plaintiffs are oyster growers in and near Onset Bay in the town of Wareham in the State of Massachusetts, and held licenses to plant, grow, and dig oysters in certain lots. The individual plaintiffs held their licenses for the

and held licenses to plant, grow, and dig oysters in certain lots. The individual plaintiffs held their licenses for the use and benefit of the Schroeder Besse Oyster Company, Inc. They claim no separate interest. Under the River and Harbor Act of 1985, act of August

Under the River and Harbor Act of 1985, act of August 30, 1935, 49 Stat. 1028, 1029, the Government undertook the improvement of Cape Cod Canal as set out in the act, and Rivers and Harbors Committee Document No. 15, 74th Congress, 1st Session, and commenced dredging operations on that project in the year 1936 and continued throughout the years 1937 and 1938. In conducting these operations the defendant used several types of dredges. At times the hydraulic pipe-line dredge, the dipper dredge, the seagoing hopper dredge, and the clamshell dredge were used. Some of these dredges were used at the same time and others from time to time. There was no continuous preration in any definite line or section of the canal. The dredges were moved from place to place and from one direction to another, and were operated from time to time. The operation of these dredges on this project caused much silt to be deposited on plaintiff's oyster grounds and seedcatching bars which resulted in damage to plaintiff's oyster grounds, oysters, and seed-catching operations.

grounds, oysters, and seed-catching operations.

The oyster grounds involved in this case were lots of land for the most part lying in the shallow waters of Onset Bay, Massachusetts, and licensed to plaintiff by the town of Wareham, by the authority of the Commonwealth of Massachusetts.

Massachusetts.

There was no advance notice given to plaintiff of the dredging on the Cape Cod Canal other than the general notice to the public in the passage of the River and Harbor Act of 1935. No written notice was served on it.

In the River and Harbor Act of 1935, supra, providing for this project there is inserted section 13, which reads as follows:

Opinion of the Court That the Court of Claims shall have jurisdiction to

hear and determine claims for damages to ovster growers upon private or leased lands or bottoms arising from dredging operations and use of other machinery and equipment in making such improvements: Provided.

That suits shall be instituted within one year after such operations shall have terminated. Under the terms of this act the Government has not only

given plaintiff the right to sue for damages but it admits

its liability for all damages resulting to oyster growers from "dredging operations and use of other machinery and equipment" for making such improvements. It is not necessary under the terms of this act to prove

negligence in the operation of any instrumentality of the Government but simply to show by the preponderance of the evidence that the plaintiff was an oyster grower who was damaged as a result of dredging operations and the use of machinery and equipment in making the improvements.

This case is in line with the decision of this court in Radel Oyster Company v. United States, 78 C. Cls. 816, in which the Government admitted liability for the tort.

In the instant case no negligence has to be proved but only that damages have been sustained by the use of these instrumentalities of the Government and by the dredging operations.

The instant case is different from the Mansfield case, 94 C. Cls. 397, which was under a special jurisdictional act and required that negligence be proved.

In the trial of this case the defendant has introduced no witnesses. One of the defendant's engineers testified as a witness for the plaintiff. No other engineer engaged in the operation testified for either party and no attempt has been made by the defendant to contradict the evidence of plaintiff as to the amount of loss sustained.

The commissioner has found in a careful examination of the evidence and the court has adopted and confirmed his finding that, due to the dredging operations, certain lots (Finding 4) totaling 27.3 acres were permanently destroyed for the propagation and growing of oysters and the licenses for their use in planting, growing, and digging Opinion of the Court

Oysters have become valueless. The total damage to the

plaintiff for this acreage is \$1,911.00. Plaintiff is entitled to recover on this item.

On certain other lots, set out in Finding 5, mud and silt deposits caused by defendant's dredging operations destroyed certain mature oysters which had been planted by the plaintiff on its oyster beds. The loss sustained by plaintiff due to the destruction of these mature oysters totals \$4,882.96. Plaintiff is entitled to recover on this item.

In addition to the lots above mentioned, there were two lots, No. 17 and No. 15, on which oysters had been planted and upon which most and sill were deposited by defendantly origing to the madry condition of the best and the heavy proportion of dead oyster which were brought to the surface, it was determined that further salvage operations when the surface, it was determined that further salvage operations when the surface is was determined that further salvage operations of the surface, it was determined that further salvage operations of the surface, it was determined that further salvage operations of the surface of the surfa

Plaintiff planted 9.100 bushels of shells on five lots for the purpose of catching sets of young oysters. The object and aim of plaintiff in setting out these shells was for the nurpose of having snawn attach themselves to the shells and become young seed oysters and in this way reclaim certain beds. This method was in conformity with the custom of ovster growers in the general conduct of their business of growing oysters. These operations were in the nature of tests and experiments and were fully justified under the circumstances. However, due to the mud and silt stirred up by the dredges and carried a long distance by the current, the snawn were destroyed with the result that there were no adhesions to the shells and there was a total loss. In 1937 plaintiff repeated these operations and this time planted 8,075 bushels of shells with the same purpose and object in view. Claim is made that, had plaintiff been successful in obtaining the usual number of young sets on these shells, their value would have been \$.50 a bushel,

these shells, their value would have been \$.50 a bushel.

There is no question that the plaintiff was justified in
attempting to conduct its business in the usual manner for

propagating oysters for the coming season by depositing shells on the seed-catching bars and is entitled to whatever damage it existined by reason of the outlay to which it was put. In other words, plaintiff is entitled to recover the value of the oyster shells and the cost of labor in depositing them upon the beds.

Both these operations, in 1936 and 1937, were tests and experiments in attempting to reclaim oyster beds which plaintiff knew had been affected by the dredging operations. Particularly is this true in the operations during 1937. Plaintiff had reasonable cause to believe that these dredge ing operations would continue and from its experience knew that the dredging operations were causing mud and silt to be carried in the currents to all parts of the beds and that there was no way of definitely knowing at which point this mud and silt would settle. As a business company attempting to continue its business as in former years. during adverse conditions, and in attempting to minimize its damage, plaintiff was justified in planting the shells in the hope of favorable results, and is entitled to recover a reasonable value for the shells and the cost of depositing them on the beds.

We are unable to find from the record, however, that, as a matter of fact, the results would have been favorable, that is to say, that plaintiff would with certainty, in the absence of a depoint of silt, have obtained a harvest of seed oysters in whole or in part. To allow the value of seed oysters, which might have grown on these shells, is to allow speculative damages. No speculative damages as allowable under the stems of the each. It is only as a lowable under the stems of the each. It is only of directing operations that plaintiff can recover. Plaintiff is entitled to recover \$1,712.50 on this item.

Plaintiff is entitled to recover and judgment is rendered in favor of the plaintiff in the amount of \$14,614.02. It is so ordered.

Madden, Judge; Jones, Judge; Whitakee, Judge; and Littleton, Judge, concur. HORACE S. WHITMAN v. THE UNITED STATES

No. 44029

CHARLES RECHT v. THE UNITED STATES

No. 44030

ROSE WEISS v. THE UNITED STATES

H. ROZIER DULANY, JR. v. THE UNITED STATES

OSMOND K. FRAENKEL v. THE UNITED STATES

No. 44034

WILLIAM L. RAWLS AND WILLIAM L. MARBURY, Jr. v. THE UNITED STATES

RUSSELL H. ROBBINS v. THE UNITED STATES

FERDERIC R. COLDERT, PAUL FULLER, N.,
FEDERIC R. COUDERT, N., THOMAS K. FIXLETTER, JAMES E. HOPKINS, MAHLON R. JONIG, FERDERIC C. BELLINGER, THOMAS
KELLY, GEORGE S. MONTGOMERY, Ja., AND
FERGY A. SHAY, CONDATIONS BODIOS DELINING UNITED STATES
V. THE UNITED STATES

No. 44354

VICTOR E. GARTZ v. THE UNITED STATES

BORIS BRASOL v. THE UNITED STATES

No. 44398

as follows:

# BASIL B. ELIASHEVITCH v. THE UNITED STATES No. 44487

#### [Decided March 2, 1942]

## On the Proofs

# Attorneys' fees in "Rustian Volunteer Fleet" case.—Indoment en-

tered in Nos. 44090, 44334, 44302, and 44188 under the special jurisdictional Act of June 25, 1989, and petitions dismissed in Nos. 44029, 44031, 44033, 44034, 44041, 44383, and 44457.

# The Reporter's statement of the case:

- Mr. Horace S. Whitman, with whom was Mr. Osmond K. Fraenkel, for the plaintiff in No. 44030.
  - Mr. H. J. Gerrity for the plaintiff in No. 44188.
  - Mr. Mahlon B. Doing for the plaintiff in No. 44354.
  - Mr. J. F. Staley for the defendant in each case.
- Nos. 44029, 44031, 44033, 44034, and 44041, submitted on argument made in No. 44030. Nos. 44392, 44393, and 44487 submitted on argument
- made in No. 44354.

  The facts sufficiently appear from the order of the court.

#### ORDER

These cases come before the court under a special act of Congress approved June 25, 1938, 52 Stat. 1399, which reads as follows:

"Be it emoted by the Senate and House of Representatives of the Distell States of America in Congrue assembled, That jurisdiction is hereby conferred upon mine, and render judgment on the claims of the statorneys for the plaintfit in the case entitled "Bassian for the first and assembled disbursements incurred by them and reasonable value of legal services vandered by them and reasonable disbursements incurred by them and reasonable disbursements incurred by the proposed of the control of the control Chaine presents to this Act after the expiration of six months state of the control of the control Chaine."

within the statutory period; and the commissioner of the

#### Reporter's Statement of the Case

court to whom the cases were referred filed his report thereon September 29, 1941.

On February 3, 1942, these cases were argued before the court by the respective parties; and after consideration thereof and of exceptions filed to the commissioner's report, and the briefs in the cases.

It is ordered this 2d day of March 1942 that judgments in the amounts stated below be and the same are entered in favor of the plaintiffs named as the fair and reasonable value of the legal services rendered by them in the case of the Russian Volunteer Fleet v. The United

in the case of the Russian Volunteer Fleet v. The United States, No. 69-A,\* to wit: "CHARLES RECHT (No. 44030) and the attorneys associated with him—one hundred twenty-five thousand

dollars (\$125,000);
"COUDERT BROTHERS (No. 44354) and the attorneys associated with them—ten thousand dollars

(\$10,000); "VICTOR E. GARTZ (No. 44392) and his associate RUSSELL H. ROBBINS (No. 44188)—eight thousand

RUSSELL H. ROBBINS (No. 44186)—eight anousand dollars (\$8,000)."

It is further ordered that in addition to the forecoing amounts there be and hereby are allowed to the

certain plaintiffs named below the amounts stated as reimbursement of the reasonable disbursements incurred by them in the prosecution of said case No. 69-A, to wit: "CHARLES RECHT (No. 44080) and the attorneys associated with him-thirteen thousand seven hundred

sixty-eight dollars and seventy-four cents (\$13,768.74); "COUDERT BROTHERS (No. 44354)—three thousand eight hundred forty-three dollars and twenty-three cents (\$2,843.23)."

cente (\$3,93.23.).
The petitions of HORACE S. WHITMAN (No. 40029); ROSE WEISS (No. 44031); H. RÖZIER, DUILANY, Ja. (No. 44088); OSMOND K. FRAEN-KEL (No. 44044); WILLIAM L. RAWIS and WILLIAM L. MARBURY, Ja. (No. 44041); BORIS

BRASOL (No. 44393); and BASIL B. ELIASHE-VITCH (No. 44497) are hereby dismissed. By the Court.

RIGHARD S. WHALEY.

Chief Justice.

<sup>\*</sup>For opinion in the Russian Volunteer Flost case (No. 69-A) see 68 C. Cis. \$2; reversed by the Suprema Court, 282 U. S. 481; 71 C. Cis. 785.



# CASES DECIDED

IN

#### THE COURT OF CLAIMS

December 1, 1841, to March 81, 1848
INCLUSIVE, UNDER THE ACT OF JUNE 25, 1898, TO RECOVER
INCREASED COSTS IN CONNECTION WITH GOVERNMENT
CONTRACTS RESULTING FROM THE ENACTMENT OF THE
NATIONAL INDUSTRIAL RECOVERY ACT\*

DOUGLAS AIRCRAFT COMPANY, INC., A COR-PORATION, v. THE UNITED STATES

[No. 44169. Decided December 1, 1941]
On the Proofs

Extra labor costs under National Industrial Recovery Act; date of completion of contract: claim not timely filed.-Where in fulfillment of a contract with the Government for construction of 24 similanes the twenty-fourth and final similane was delivered and accepted December 7, 1934, and the final shipment of technical data was made February 6 1925 which constituted completion of the contract with the exception of certain spare parts, required under a change order, shipped on February 26, 1935; and where the claim under said contract was forwarded with a letter dated August 28, 1985, and where the notarial certificate attached to and verifying said claim was dated September 3, 1935; it is held that the earliest date on which said claim could have been filed was Sentember 3, 1935, and accordingly plaintiff is not entitled to recover for said claim under the provisions of the Act of June 16, 1934, as amended by the Act of June 25, 1938, requiring that claims of centractors for increased costs incurred as a result of the enactment of the National Industrial Recovery Act should be filed within

6 months after the completion of the contract.

<sup>\*</sup>See vol. 92. pp. xxiii-xxix.

95 C Cla

Reporter's Statement of the Case
Same; cloims timely filed.—Where timely claims were filed in connection with two additional contracts between plaintiff and the

Government; it is held:

Plaintiff is entitled to recover for items of increased costs
incurred after November 27, 1933, in connection with the em-

Incurrent arter November 27, 1983, in connection with the emphoyees who entered its service prior to November 27, 1983; Plaintiff is entitled to recover for items of increased costs in connection with emphyses who entered its service after November 27, 1893, for the period between November 27, 1983, and June 2, 1984.

The Reporter's statement of the case:

Mr. Ward H. Oehmann for the plaintiff. Messrs. Rhodes, Klepinger & Rhodes were on the briefs. Mr. Robert Ε. Mitchell, with whom was Mr. Assistant At-

torney General Francis M. Shea, for the defendant.

The court made special findings of fact as follows:

 Plaintiff, Douglas Aircraft Company, Inc., is a corporation engaged in the manufacture of airplanes, organized and existing under the laws of the State of Delaware, and having its principal place of business in Santa Monica, California.

Plaintiff is the sole owner of this claim and no action has been had with reference thereto by any department of the Government except as set forth in Finding 18.

2. On August 28, 1933, plaintiff signed the President's Re-employment Agreement authorized by Section 4 (a) of the National Industrial Recovery Act of June 16, 1933 (48 Stat. 194) with substituted provisions for the aircraft manufacturing industry, a copy of which, Joint Exhibit 4, is by reference made a part of this finding.

Paragraphs 3, 6, and 7 of the President's Reemployment Agreement, with the said substituted provisions, are as follows:

(3) Factory or mechanical workers or artisans shall not be employed more than 40 hours per week, averaged over a 3 months' period; provided, however, that such employees shall not be employed more than 48 hours per week. Employees shall receive time and one-third for hours worked in excess of 8 hours per day. (6) Not to pay any employee of the classes mentioned in paragraph (3) less than 40 cents per hour unless the hourly rate for the same class of work on July 15, 1929, was less than 40 cents per hour, in which latter case not to pay less than the hourly rate on July 15, 1929, and in no event less than 30 cents per hour, it is agreed that this paragraph establishes a guaranteed

minimum rate of pay regardless of whether the employee is compensated on the basis of a time rate or on a piecework performance. (7) Not to reduce the compensation for employment

(7) Not to reduce the compensation for employment now in excess of the minimum wages hereby agreed to (not with the days).

(notwithstanding that the hours worked in such employment may be hereby reduced) and to increase the pay for such employment by an equitable readjustment of all pay schedules.

There was no code of fair competition adopted by the aircraft manufacturing industry.

3. On August 28, 1933, the date upon which the agreement was signed, plaintiff reduced the schedule of working hours in its shop from 47½ to 40 hours a week and began paying one and one-third times the regular hourly rate of pay for hours in excess of 8 per day.

At the time the agreement was signed the plaintiff published a notice to its employees as follows:

## VERY IMPORTANT TO OUR EMPLOYEES

- (1) The Aeronautical Industry has signed a Code which has the approval of the Policy Board of the National Recovery Administration and which Code specifies that until further notice from and after August 28, 1083, no factory labor shall be employed for more than 40 hours a week averaged over a 3 months' period with not more than 48 hours in any one week.
- (2) Time and one-third pay for overtime for factory labor over eight (8) hours in any one day. (3) Office help, 40 hours a week averaged over a
- period of one month with not more than 48 hours in any one week.

  (4) No one under 16 years of age will be employed.
  - (2) Minimum wages for hourly workers will be 40¢ an hour, and to salaried employees \$16.00 a week.

    For the present no increase in hourly rates will be

For the present no increase in hourly rates will be made to compensate for the shorter week, for the following reasons: (a) This Company has unfilled contracts with the United States Government, prices of which are based on the present cost of labor, and we have been informed by the purchasing departments of the Government that they will not increase our prices to take care of any increase in cost of labor due to the National Recovery

(b) While this company is desirous and intends to make some equitable readjustment of the hourly rates of pay because of the shorter work week, this question is one that has to be arrived at thru the Aeronautical Chamber of Commerce of America, with the other members of the aircraft industry. We are working on the aircraft industry. We are working on this regard a summer to you. (Joint earlies No. 10, made a part here of by reference.)

Plaintiff does not make any claim in the present suit for any increased costs incurred prior to November 27, 1933, as the result of such overtime wage increases and reduction in working hours.

4. On November 27, 1933, after various negotiations and correspondence with officials of the National Recovery Administration concerning compliance by the plantiff with the terms of the Frendent's Riemplyment Agreement, and agreement, and plantiff changed the rate of wages paid to time embryone by granting a pay increase of approximately 10 percent to all the employees then on its rolls, with the exception of 15 newly hired men to whom this increase was not extended and 4 other men who had been given a twenty of the property of the p

Prior to this increase plaintiff had an established minimum wage of 40 cents an hour, with the exception of a few high-school boys working in the plant as apprentices.

When the increase took place the 40-cent minimum rate disappeared from the pay rolls and became 44 cents an hour. 5. On November 27, 1933, at the time of the 10 percent

pay increase, there were approximately 640 shop employees in plaintiff's plant, and in the following six months this number was increased to approximately 2,200.

Plaintiff, during the period involved in the present action, had no fixed wage scale in its factory, and there is no

Reporter's Statement of the Care evidence of any given rate for a given character of work.

The salary of a new employee was fixed by the departmental foreman in collaboration with the personnel department and the factory superintendent after an interview was had with the employee relative to his qualifications and experience.

The wage brackets for the several types of work in the shop showed that a definite increase in wages was paid dur-

ing the period between November 27, 1933, and June 2, 1934. to employees who were engaged after November 27, 1988. However, after June 2, 1934, the record shows that the wages of these same employees reverted to practically the same level that existed for the same type of employees for the period prior to November 27, 1983,

6. An analysis of the average wage of plaintiff's shop employees at intervals of six months was made for a threeyear period. This analysis, defendant's Exhibit D, is by reference made a part of this finding.

The following tabulation contains data and computations from this analysis from June 1982 to December 1934, inclusive:

Item	Date	Number employees	Difference	Average	Difference	Percent change
1 2 1	6-4-32 12-3-39 6-3-53 12-9-36 6-9-34 12-1-34	685 562 827 643 2, 204 1, 989	93 decrease 203 increase	\$0.60 .614 .168 .672 .781 .605	\$0.014 Increase .015 decrease .014 Increase .014 decrease	+2.33 -2.60 +12.37 -18.84 +2.41

7. When plaintiff at the time of signing the President's Reemployment Agreement changed the schedule of hours in its shop, a system of maintaining individual records of hours worked in excess of 40 a week was established, and employees who worked more than 40 hours a week were required to take compensating time off so that their average hours for a three months' period would not exceed 40 a week. As previously stated, one and one-third times the regular rate was paid for more than 8 hours a day, but employees were permitted to work 48 hours a week, or 6 days at 8 hours a day, without overtime pay. During November 449973-42-CC-val. 95-49

Reporter's Statement of the Case

1933 this was changed in order to provide overtime pay for
hours in excess of 40 a week as well as 8 a day.

The increased shop labor cost due to payment of this overtime subsequent to November 27, 1983, is included in the present action. Engineering employees, except for the loft and template department, and indirect labor such as maintenance men, were not paid the overtime rate, and they are not included.

#### THE GOVERNMENT CONTRACTS

8. Plaintiff entered into contract W-o35-ac-5450 with the Army Air Corps for the manufacture of one amphibina observation airplane Model YO-44, for a consideration of 8150,00. This contract, dated November 18, 1982, received official approval of the Assistant Secretary of War on Deeember 7, 1982, and specified delivery of the airplane 340 days from that date, or by November 19, 1982.

Plaintiff was to furnish under the contract certain technical data, drawings, and maintenance instructions prior to or concurrent with the delivery of the airplane.

Under the terms of the contract the defendant was to furnish the plaintiff with the engines and certain equipment and materials specified therein.

The airolane was delivered February 22, 1935, and the

final shipment of technical data on February 27, 1985, completed the contract.

The airplane was of a new experimental type, and various

The airpines was of a new, asperimental type, and various deviations and changes in design were ordered by the definations and changes in design were ordered by the defination at the work progressed. Some of these changes required redispinging and reengineering wave on the part of plantiff with a consequent delay, and defendant was not explained with a consequent delay, and defendant was not explained to the contract requirements, but it is impossible to engineering mistisked by plaintiff and the failure of some of the work to near contract requirements, but it is impossible to determine from the record any allocation of delay or extension of time to either plaintiff or defendant.

A copy of this contract and the accompanying change orders, engineer orders, and deviations, Joint Exhibit 1, is by reference made a part of this finding. 9. A change order No. 2 was issued under Article 2 of the content, this change order being signed by H. H. Wetzel, this change order being signed by H. H. Wetzel, and the content of the

in the contract price.

Plaintiff did not request any extension of contract time in connection with this or other change orders, and none was granted by defendant.

10. Plaintiff entered into contract W-535-ac-5743 with the Army Air Corps for the manufacture of 24 Douglas observation planes, type 0-53, together with spare parts, technical data, maintenance instructions, etc., as set forth by the contract and specifications, for a total consideration not in excess of \$440.004.

This contract, dated February 28, 1933, was officially approved by the Assistant Secretary of War March 2, 1933, and specified delivery of the airpianes not later than serem months and two weeks after the contract date, or by October 16, 1933. Delivery of the spare parts and various items of technical data was required at certain specified intervals, delivery of the spare parts to be made by November 16, 1933, and the technical data by December 1, 1933.

The defendant agreed to furnish the engines and certain equipment and materials set forth in the specifications.

equipment and materials set forth in the specimeations.

A copy of this contract and the accompanying change orders, Joint Exhibit 2, is by reference made a part of this finding.

11. There were five change orders issued in connection with the above contract under Article 2 thereof, change orders Nos. 1, 4, and 5 resulting in an increase of \$83,696 in the contract price, and change orders Nos. 2 and 3 resulting in a decrease of \$165,69, the change orders therefore resulting in a net increase of \$35,500,90.

Change order No. 1 was signed on behalf of the Douglas Aircraft Company under date of January 16, 1934, being approved by the Assistant Secretary of War under date of January 24, 1834, and therefore subsequent to the enactment of the National Industrial Recovery Act, and the increased wage scale put in effect by plaintiff. This change order specified added equipment, which resulted in an increase of \$29,780 in the contract price.

Chango order No. 4 was signed on behalf of the Douglas Aircraft Company under date of May 26, 1949, being approved by the Assistant Secretary of War under date of June 15, 1944, and therefore subsequent to the enactment of the National Industrial Recovery Act and the increased wage scale put in effect by the plaintiff. This change order also specified added equipment, which resulted in an increase of \$1.088 in the contract brice.

Change order No. 5 was signed on behalf of the Douglias Aircraft Company under date of August 14, 1984, being approved by the Assistant Secretary of War under date of most of the August 14, 1984, being approved by the Assistant Secretary of War under date most of the National Hondrical Recovery Act and the increased wage scale pat in effect by the phintiff. This changes order changed the type of one of the airplanes from type  $O=48 \Lambda$  to XO=40 by providing for the installation of a different type of engine, together with the necessary of a different type of engine, together with the necessary

structural changes.

Plaintiff was also required to furnish certain parts and technical data, and the delivery date for the altered air-plane was extended to 190 days from the date of the change order. This change order resulted in an increase of \$4,500 in the contract price.

The plane was delivered October 8, 1934, within the time as extended.

No other extension to the contract time other than that stated in connection with change order No. 5 was requested by plaintiff or granted by the defendant.

by planatin or grantest by the detendant.

12. The delay in the completion of this contract was due to various factors. Defendant was unable to supply some of the technical information and some of the equipment, such as engines, to the plaintiff at the time such equipment was needed by ulaintiff.

#### Reporter's Statement of the Case

Plaintiff accomplished very little of the parts fabrication prior to October 1933, and thereafter was delayed because some of them would not fit or function satisfactority. Plaintiff had difficulty in making certain of the planes satisfy specification requirements, and considerable time was lost in changing and tworking them.

Many of the delays were coextensive with others, and it is impossible to determine from the record any allocation of delay or extension of time to either plaintiff or defendant.

delay or extension of time to either plaintiff or defendant.

13. The following facts and data relate to the completion

of this contract:

A time-distribution chart in reference to work performed in connection with the contract, plaintiff's Exhibit 2, made a part hereof by reference, indicates a completion of engineering hours on or about November 30, 1834, and of shop hours on December 10, 1839.

The twenty-fourth and final airplane called for under the contract was delivered December 7, 1934, and the final shipment of technical data was made February 6, 1935.

Certain O-48A fabricated parts not required on the XO-46 plane, the plane altered by change order No. 5, and which were required to be delivered to the Government by such change order, were shipped on February 26, 1985. This was

the final shipment of spare parts.

The contract specified that the spare parts for the type

O-43A airplanes should be accepted at the contractor's plant.

A copy of the Government inspector's weekly reports,
defendant's Exhibit I, is by reference made a part of this
finding.

14. On April 11, 1935, defendant advised plaintiff that, according to its parts list, it had furnished to the Air Corps in the parts shipment of January 9, 1935, certain spare parts comprising some cables and shields which did not apply to the type O-83A airplanes. On plaintiff's request these parts were returned to the factory for reworking.

were returned to the factory for reworking.

A schedule of dates of shipments, billings, and payments
with reference to this contract (W-535-ac-5743), defend-

ant's Exhibit C, is by reference made a part of this finding.

This schedule shows payment on March 25, 1935, of \$2,111
and on March 31, 1935, of \$8 on an invoice of February

12, 1935, for certain sparse parts shipped under dates of September 13, 1934, January 9, 1935, and February 1, 1935. The last payment made to plaintiff under this contract was in the amount of \$900 and was made in August 1935.

This was for item 6 of the contract, "Handbook of Instructions with Parts Catalog and Price List Compilations," which had been shipped to defendant on August 2, 1994. Plaintiff did not invoice this handbook to the Government until March 292, 1995.

On June 10, 1986, attention of the plaintiff was called to the fact that certain sheets were missing from the numerical price list furnished in connection with this contract and with the request that Vandycks or photographic negatives of these sheets be furnished.

of these sheets be furnished.

In August 1937, the plaintiff forwarded to the Air Corps
Supply Officer the revised parts list changes and Vandycks.

15. On May 29, 1933, plaintiff entered into a contract, No.
1543, with the Navy Department for the manufacture of

one X-02D airplane and agreed to furnish certain items of technical data and information for a consideration of \$105, 000, defendant agreeing to furnish to plaintiff certain material, described by the specifications, for installation in the airplane. Delivery of the plane was required by November 1, 1983, and the final corrected technical data within thirty

days from that date.

The airplane called for by the contract was of an experimental nature and plaintiff had begun preparatory enterprises in a second of the contract date.

permisent arthere and programs in an togging properatory siggenering work over two months before the contract date, grammatically an experimental programs of the various parts occurred which caused delays and artificially an experimental programs of the programs of the various some sight delays in the furnishing of contain parts to plaintiff by defendant such as a find gauge, pumps and pump fittings, but no oridence that these caused any material delay in the contract.

A time chart, plaintiff's Exhibit 7, which is by reference made a part of this finding, indicates continuous progress of both engineering and shop work on this contract.

On November 8, 1983, plaintiff requested a 60-day extension of time for the delivery of the airplane and final corReporter's Statement of the Case

rected data, stating difficulty was experienced in procuring raw materials and in aileron design. The requested extension of time was granted by defendant on November 28,

1933. The airplane was completed and ready for delivery on

April 30, 1934, and the final technical data were shipped in June 1934. After delivery of the airplane to the Government, tests by the Navy developed the presence of certain difficulties in connection with the plane, and the airplane was subsequently returned to the Douglas Aircraft plant and some additional work done thereon. The ultimate contract price was adjusted pursuant to the bonus penalty clause in

the contract covered by items 35 and 36 of the contract, A conv of this contract, and accompanying change orders, Joint Exhibit 3, is by reference made a part of this finding. 16. Several change orders were issued in connection with this contract, one of which resulted in an increase of the contract price of \$170.87. This change order, No. 4, was

entered into under date of November 10, 1933, subsequent to the enactment of the National Industrial Recovery Act and the published notice of plaintiff to its employees (Finding 3), and prior to the wage increase of November 27, 1933. Plaintiff did not request any extension to the contract

time in connection with these change orders and none was authorized by the defendant, 17. Within the limitation period as prescribed by Section

4 of the act of June 16, 1934 (48 Stat. 974), plaintiff filed claims for increased costs incurred in the performance of War Department contract W-535-ac-5450 and Navy Department contract No. 31543.

These claims, which were in the amounts of \$12,662.45 for the War Department contract and \$3,262.68 for the Navy Department contract, were denied by the Comptroller General on March 25, 1937, and January 13, 1936, respectively.

18. On or about September 3, 1935, plaintiff filed a claim under the act of June 16, 1934, supra, in the amount of \$19,240.58 for increased costs incurred in the performance of War Department contract W-535-ac-5743. On March 25, 1937, the Acting Comptroller General denied this claim,

95 C. Cls.

Reporter's Statement of the Case

and on November 22, 1938, after a reconsideration of the claim, again denied the same.

The date of filing of this claim was more than six months subsequent to the delivery and shipment dates of the airplanes, parts, and data, as specifically set forth in Finding 13. Copies of the submitted claims, Joint Exhibits 5, 6, and 7, are by reference made a part of this finding.

19. Proof of the claims and supporting data were submitted to defendant in accordance with the order entered by the Court of Claims on February 1, 1839, and as provided by such order an audit of plaintiff's books and records was made by defendant's accountant, with the cooperation of plaintiff's accountant. A cony of the audit and work sheets.

Joint Exhibit 8, is by reference made a part of this finding. The parties have stipulated the following schedule as a correct statement and segregation of the amounts involved. The first and second columns of the schedule are an allocation of plaintilis' claim, as to increased labor costs due to hourly rates, between old employees on the pay rolls on November 27, 1933, and new employees hired after that date.

The increased cost due to overtime is not affected by the computations relative to old and new employees since overtime was paid on the basis of one and one-third times the actual rate received by the employee, irrespective of whether he was an old or new employee.

	Increased costs due to hourly rates		Increased costs due	Total
	Employees hired price to 11/27/23	Employees hired after 11/27/83	to payment of overtime	increased costs
Contract #5450: Original contract	\$4, 668.31 17.98	\$5, 601. 94 22. 54	\$2, 446, 35 9, 84	812, 516. 50.
Total	4, 495. 29	5,604.48	2,450.19	12, 586.
Contract #5348: Original contract. Change order #1. Change order #4. Change order #6.		1, 195. 49 665. 43 33. 31 91. 63	1, 509, 03 102, 23 5, 62 15, 47	17, 492. 1, 190. 65. 180.
Total	7, 677. 92	9, 605. 65	1, 625.35	18, 929.
Contract #0143: Original contract. Change order	1, 275, 35 2, 08	1,596.66	290.00 .63	3, 263
Total	1, 277, 23	1,601.26	390, 63	3, 269.

Opinion of the Court

20. Plaintiff in the performance of its War Department contract W-535-ac-5450 actually incurred the sum of \$9,540.14 incurred labor cost as the result of the enactment of the National Ludwigin Research.

of the National Industrial Recovery Act.

This sum is based upon the increased wage scale paid

to the old employees and the overtime wages paid to both the old and new employees in the performance of the contract as contained in the schedule set forth in the previous finding. It also includes the increased wage scale of the new employees for the period November 27, 1933, to June 19, 1954. It excludes any increased labor costs due to the change order as set forth in the above schedule.

21. Plaintiff in the performance of its Navy contract No. 31543 actually incurred the sum of \$2,414.38 increased labor cost as the result of the enactment of the National Industrial Recovery Act.

This sum is based upon the increased wage scale poid to the old employees and the overtime wages paid to beth the old and new employees in the performance of the contract as contained in the schedule set forth in Friding 19. It also includes the increased wage scale of the new employees for the period November 27, 1938, to June 2, 1934. It excludes any increased labor costs due to the change order as set forth in the above schedule.

The court decided that the plaintiff was entitled to recover on claims timely filed.

Jones. Judge, delivered the opinion of the court:

The plaintiff corporation is engaged in the manufacture of airplanes. It entered into three contracts to build planes for the Government. Two of these contracts were with the Amy and one with the Navy. The first Army contract, dated November 18, 1082, called for the construction of an observation plane for the Army at case of \$818,0000. The second contract with the Army, dated February 28, 1083, contract with the Army, dated February 28, 1083, the second contract with the Army, dated February 28, 1083, the contract with the Army, dated February 28, 1083, the contract with the Army dated February 28, 1083, the contract of the Army dated Fe

Opinion of the Court
the consideration of \$105,000.00. The contract was dated
May 29, 1933.

May 29, 1933.

The plaintiff institutes this suit to recover increased costs incurred in the construction of these planes, claiming that

incurred in the construction of these planes, claiming that such costs were due to the enactment of the National Industrial Recovery Act (48 Stat. 195). The action is brought pursuant to the Act of Congress

approved June 25, 1838 (§2 Stat. 1197), conferring jurisdiction on the Court of Claims to hear, determine, and enter judgment against the United States upon the claims of contractors for increased costs incurred as a result of the enactment of the National Industrial Recovery Act, supra. We will first consider the second Army contract No.

We will first consider the second Army contract, No. W-383-ac-5743, which calls for the construction of 24 sirr-planes for the Army. As to the claims arising under this contract, the defendant pleads that they were not filed within the six months' period provided for in the jurisdictional act of June 16, 1934 (48 Stat. 974), and carried forward in the amendatory act of June 2s. 1938, supra.

The 24th and final airplane called for under this contract was delivered and accepted December 7, 1984, and the final shipment of technical data was made February 6, 1985. This constituted completion of the contract with the exception of certain spare parts required under a change order, and which were shipped on February 96, 1936.

The claim under this contract was filed on or after September 3, 1983. A letter which accompanied the claim was dated August 28, 1938, but the notarial certificate attached to the claim and verifying it was dated September 3, 1939. The earliest date, therefore, on which the claim could have been filled was September 3, 1935. Thus, more than six months had elapsed from the time of the completion of the contract.

Plaintiff undertakes to bring the claim within the six months' period by calling attention to the fact that as late as March 9, 1935, it entered some record charges against the contract, and since the letter accompanying the claim was dated August 28, 1935, the six months' period had not elansed.

The latter date, however, is contrary to the stipulation of the parties and contrary to the facts in the case which show the claim was filed on or after September 3, 1935.

Plaintiff also called attention to the fact that in April 1935 it was discovered by the Air Corps headquarters at Wright Field, Ohio, that, according to plaintiff's shipping ticket accompanying the shipment of spares made on January 9, 1935, to the Air Depot at San Antonio, Texas, plaintiff had furnished two parts, a cable and shield, which were not applicable to this type of airplane. On plaintiff's request these parts were returned to it for correction. On June 10, 1936, the Air Corps advised plaintiff that certain sheets of photographic negatives were missing from the parts list furnished under the contract, and on July 17, 1936, after an exchange of correspondence about the missing sheets, plaintiff sent the Air Corps another set of parts list negatives. Delivery of the parts list had been made by plaintiff on August 24, 1934, and payment therefor made on November 30 and December 4, 1934. These were minor errors that frequently develop in the handling of delicate and complicated machinery. To hold that such corrections constituted a continuation of the contract would mean that contracts would thus be continued almost indefinitely.

The Act of June 25, 1938, confers jurisdiction on the Court of Claims in connection with contractors and others "whose claims were presented within the limitation period defined in section 4 of the Act of June 16, 1934." Section 4 of the Act of June 16, 1934, supra, reads in part as follows:

No claim hereunder shall be considered or allowed unless presented within six months from the date of approval of this Act or, at the option of the claimant, within six months after completion of the contract.

According to the terms of this limitation, the claims under this contract were not filed within the six months' period and the court is therefore without jurisdiction to make any award.

Timely claims were filed in connection with the other two

contracts. The airplanes called for in both the Army and the Navy contracts were of a new, experimental type. Various deviaOpinion of the Court

tions and changes in design were ordered by the defendant as the work progressed. Some of these changes required redesigning and reengineering work on the part of the plaintiff, with a consequent delay. These delays, change orders, and corrections were the natural result of the building of new and experimental types of planes. Neither plaintiff nor defendant offers any material complaint regarding such change orders, corrections, and consequent delays.

In the performance of the War Department Contract W-535-ac-5450 plaintiff actually and necessarily incurred increased labor costs in the sum of \$9,540.14 as a result of the enactment of the National Industrial Recovery Act.

In the performance of its Navy contract No. 31543 plaintiff actually and necessarily incurred increased labor costs in the sum of \$2,414.38 as the result of the enactment of the National Industrial Recovery Act.

The schedule set out in Finding 19 and the explanation made in Findings 20 and 21 show a detailed analysis of these sums.

The items of increased costs were audited and definitely ascertained by the auditors of the Federal Bureau of Investigation and by an auditing firm representing the plaintiff cornoration.

These items are also set out in the agreement stipulated by the parties to the suit.

The plaintiff is entitled to recover the items of increased costs after November 27, 1933, in connection with employees who entered its service prior to November 27, 1933,

It is also entitled to recover the increased costs of emplovees hired after November 27, 1983, for the period between November 27, 1933, and June 2, 1934.

After June 2, 1934, the average pay roll for these employees shows a decrease to practically the same level that existed prior to November 27, 1933. While the evidence for this period is not altogether satisfactory, it is sufficient to establish the fact that the minimum wage reverted to 40 cents per hour, the rate which had prevailed prior to November 27, 1933, and plaintiff is not entitled to recover for this period.

No. 44504. Logan Company.

The items allowed cover the wage scale paid to the employees as indicated and for the periods mentioned. They also cover overtime wages paid to both old and new employees for the entire period after November 27, 1933.

The plaintiff is entitled to recover the sum of \$11,954.52. It is so ordered.

Madden, Judge: Littleton, Judge: and Whaley, Chief Justice, concur.

WHITAKER, Judge, took no part in the decision of this case.

### No. 44358, Ferruary 2, 1942

Josephson Manufacturing Company. On plaintiff's motion for judgment with allowance of interest (to which the defendant filed an objection with respect to the item of interest) and upon a stipulation by the parties as to the amount of increased costs in connection with the performance of the contract, and upon a report and recommendation of a commissioner of the Court of Claims. judgment was allowed for the plaintiff in the sum of \$1,028.98, and judgment as to interest was disallowed.

#### JUDGMENTS ENTERED

In accordance with the provisions of the Act of June 25, 1938 (52 Stat. 1197) and on motion of the several plaintiffs (to which no objection had been filed by the defendant). and upon the several stipulations by the parties, and in accordance with the report of a commissioner in each case recommending that judgment be entered in favor of the respective plaintiffs in the sums named, it was ordered that judgments be entered as follows, for increased costs under the National Industrial Recovery Administration Act:

## ON DECEMBER 1 1041

No.	44274.	S. Mor	gan Smith Company, a Corporation	\$3,935.06
No.	44499.	Logan	Company	962, 07
No.	44500.	Logan	Company	98, 09
No.	44501.	Logan	Company	114, 46
No.	44502.	Logan	Company	82, 13
No.	44503.	Logan	Company	68, 42

# 762 JUDGMENTS UNDER THE ACT OF JUNE 25, 1938

ON JANUARY 5, 1942				
No.	44032.	Crocker-Wheeler Electric Manufacturing Co	20.67	
No.	44037.	The United Clay Products Co	2,566.81	
No.	44214.	Fort Worth Sand & Gravel Co	191. 32	
No.	44479.	Bath Iron Werks Corporation	66,903.36	

No	44212	ON MARCH 2, 1942 Missouri Hardstone Brick Commany	1, 612, 65
		The Grent Lakes Engineering Works	4, 000, 37
No.	44548.	The Baker-Whiteley Coal Company	1, 193, 50
No.	44554.	James K. Lynch, Trustee	6, 814, 80

#### PETITIONS DISMISSED

On motion of the several plaintiffs to dismiss the petitions therein, the petition in each of the following cases under the Act of June 25, 1938, was dismissed:

#### ON DECEMBER 1, 1941

44213. Atlantic Creosoting Communy, Inc. 44368. The Wage Marble & Tile Co. 44369. The Wage Marble & Tile Co. 44452. The Maxwell Paper Company.

ON JANUARY 5, 1942

#### 44192. Marietta Chair Company.

44194. Bush Brothers. 44231. Deshauriers Steel Montd Company. Inc.

44400. Rochester Ropes, Inc. 41450. North American Building Corporation.

44505. L. A. Clarke & Son, Inc. 44543. New York Credit Men's Association. 44546, Artility Metal Products, Inc.

ON FEBRUARY 2, 1942

44290. Kraftile Company. 44565, Warren E. Earhart, Trustee.

# CASES DECIDED

#### THE COURT OF CLAIMS

December 1, 1941, to March 31, 1948

INCLUSIVE, IN WHICH, EXCEPT AS OTHERWISE INDICATED,
JUDGMENTS WERE RENDERED WITHOUT OPINIONS

No. 43196. December 1, 1941.

La Grange Gold Dredging Company, A Corporation.

Gold bullion; newly mined gold; Act of March 9, 1933. Decided upon the authority of Alaska Juneau Gold Mining Company (a corporation) v. The United States, 94 C. Cls. 15. The court in an opinion wer carriam decided:

The material facts in this case are substantially the same as the facts in Alaska Juneau Gold Mining Compony (a corporation) v. United States, decided June 2, 1941 (94 C. Cls. 15). The question presented is the

Upon the facts disclosed and for the reasons set forth in the opinion in Alanka Juneson Gold Mining Company (a corporation) v. United States, supra, the court is of the opinion that the receipt and payment for plaintiff's Executive Orders, and the regulations prior to the Executive Order, and the regulations prior to the Executive Order Adagust 29, 1983, and Transury Regulations of September 12, 1983, and that plaintiff is out critical to recover. The petition is therefore dismissed.

No. 43867. DECEMBER 1, 1941

Rivers J. Morrell, Jr.
Pay and allowances; lieutenant U. S. Marine Corps; dependent mother.

In accordance with its opinion of June 3, 1940, holding that the plaintiff was entitled to recover (91 C. Cls. 302) and upon a report from the General Accounting Office showing the amount due plaintiff under the court's opinion, judgment for the plaintiff was entered in the sum of \$216.00.

## CONGERSSIONAL No. 17472. DECEMBER 1, 1941

American Cotton Oil Company, In the case of the American

In the case of the American Cotton Oil Company, to the use of Hecker Products Corporation, pursuant to the stipulation filed in the case of Rose City Cotton Oil Mill, Congressional No. 17844, and all other pending cotton linter cases as per list attached to said stipulation, and upon a stipulation and agreement of the parties, judgment for the plaintiff was entered in the sum of \$275,8822 or

#### CASES INVOLVING GOVERNMENT CONTRACTS

On authority of the court's decision in the case of Crooke Terminal Warehouses, Inc. No. 44099, 92 C. Cl. 401, and in accordance with stipulations by the respective parties in each case and upon a report of a commissioner recommending that judgment be entered in favor of the respective plaintiffs in the amounts below set forth, judgments were entered. December 1, 1941, as follows:

| \$31.4 \text{ | \$31.4 \text{ | \$1.6 \text{

No. 43919. FERRUARY 2, 1942

Kansas Flour Mills Corporation.

Government contract; nonpayment of processing tax. Judgment for the plaintiff. Opinion 92 C. Cls. 390.

Reversed by the Supreme Court, December 8, 1941; 314 U. S. 212; post p. 769.

In accordance with the mandate of the Supreme Court, reversing the decision of the Court of Claims and remanding the case for further proceedings, the petition was dismissed. No. 44634. MARCH 2, 1942

William B. Scheibel.

Pay and allowances; lieutenant in the Coast Guard; dependent mother. Plaintiff entitled to recover. Opinion 93 C. Cls. 480

In accordance with its opinion of April 7, 1941, and upon a report of the General Accounting Office as to the amount due thereunder, judgment for the plaintiff was entered in the sum of \$2,666.20.

No. 44094. March 2, 1942

James L. Harbaugh, Jr.

Pay and allowances; bachelor officer in the United States Army; dependent mother. Plaintiff entitled to recover. Opinion 93 C. Cls. 483.

In accordance with its opinion of April 7, 1941, and upon a report from the General Accounting Office as to the amount due thereunder, and upon a stipulation of the parties to the effect that during the period from April 22, 1949, to April 7, 1941, the date of the court's decision, the facts bearing upon the despendency of the mother were substantially the same, judgment was entered for the plaintiff in the sum of \$4.817.83.

No. 45014. MARCH 2, 1942

Great Northern Railway Company.

On plaintiff's motion for judgment, and upon a stipulation by the parties showing that said parties had agreed to a compromise in the sum named, judgment was entered for the plaintiff in the sum of \$14,000.00 for failure of the defendant to return in as good condition as when received 19 freight cars, delivered by plaintiff to the Wichita-Fort Peck Railroad, operated by the War Department.

#### CASES DISMISSED BY THE COURT OF CLAIMS ON MOTION OF PARTIES, OR OF THE COURT FOR NONPROSECUTION

### Cases Pertaining to Refund of Taxes

#### ON DECEMBER 1, 1941

44808. C. R. Eirk, sole stockholder.
44805. H. C. Frick Cohe Co.
45040. John W. Auflero.
45041. John W. Auflero.
45041. John W. Auflero.
45040. John W. Auflero.
45040. John W. Auflero.

Он Dескивев 2, 1941

44838. Borge-Warner Corporation.

On January 5, 1942

45305, Jersey Farm Baking Co. of 45307, Jersey Farm Baking Company.
Illinots. 45506, Orchard Farm Pie Company.
45506, Orchard Farm Pie Company.
45346, Wn. H. Block Company.

45206. Orchard Farm Pie Company. 45344. Wm. H. Bi

ON FERRUARY 2, 1942
43696. Winston Bros. Company, etc. 43816. Wilson & Co., Inc.
44666. Chester A, Wilsoughly, trustee. 45816. T. M. Sizchair & Co., Ltd.

45317. Wilson & Co., Inc. of Kansas.

# ON MARCH 2, 1942

44750. Devol Manufacturing Co.

44610, American Paper Goods Company

Cases Involving Indian Claims

On January 5, 1942 44205. Menominee Tribe of Indians 44207. Menominee Tribe of Indians

ON FEBRUARY 2, 1942 L-209. The Seminole Nation

On March 2, 1942

L-233. The Seminole Nation

Cases Pertaining To Refund of Payments Made Under Marketing Agreement

ON FERRUARY 2, 1942 45000, Joseph E. Scheram & Sons. 45074, Th

45005. Joseph E. Seugram & Sons, 15074. The Old Quaker Co. 1500. 1500. 45073. The Frank L. Wight Distilling Page. 15075. Jos. S. Finch & Co. 45075. Jos. S. Finch & Co.

pany. 45065. A Overbult & Co., Inc. 45077. Geo. 2. Sinch & Co. 45077. Geo. 2. Singy Co. 45098. National Distillers Products 45079. Schooley Distillers Corpora-

45068. Commercial Solvents Corporation.

45069. Genmore Distilleries Company.

45061. Frankfort Distilleries. Inc.

45062. Frankfort Distilleries. Inc.

45063. The Rultimere Pure Rye Distilling Co.

45064. Bardstown Distillery, Inc.

45064. Bardstown Distillery, Inc.

45072. Hiram Walker & Sons, Inc.

Cours Involving Government Contracts

# ON JANUARY 5, 1942

ON JANUARY 5, 1942 44675, Robert C. Sproul, Trustee, etc. 44675, Robert C. Sproul, Trustee, etc.

44070. Robert C. Sproul, Trustee, etc. 44070. Robert C. Sproul, Trustee, etc. 44078. Robert C. Sproul, Trustee, etc.

Cases Pertaining To Difference In Carrying Charges and Operating Costs: Federal Form Board

### On January 5, 1942

(Sec p. 472, ante)

Congressional No. 17750. Alahuma Cotton Cooperative Assa.,
17751. Valifornia Cotton Cooperative Assa., Ltd.

17751. California Cotton Cooperative Assn., Lt 17752. Georgia Cotton Growers Cooperative Assn. 17753. Leoisiana Cotton Cooperative Assn. 17754. Mid-South Cotton Growers Assn.

17755. Mississippi Cooperative Cetton Assn. et al. 17756. Neeth Carolina Cotton Growere Cooperative Assn. 17377. Okishona Cotton Growere Assn. 17758. R. C. Cotton Concernitive Assn.

17780. Texas Cotton Cooperative Assn.

Cases Pertuining To The Transportation of Transport

On Decreases 1, 1941

44654. The Pennsylvania Ratirond Co. 44682. Webster and Chapman, Trustees

Cases Involving Infringement of Patents

ON DECEMBES 1, 1941

# Miscellaneous

ON DECEMBER 1, 1941 44009. Four Wheel Drive Auto Company

45224. Bothe, Council & Laub Construction Co.

ON JANUARY 5, 1942 45295, Ruth Widen

000 1110100

ON FERRUARY 2, 1942 45328. Swift & Company

45329. Swift & Company

On March 2, 1942

45913. Great Northern Railway Co. 45917. Banks Business College 45271. Cannon Mills Company

### REPORT OF DECISIONS

OF

### THE SUPREME COURT

IN COURT OF CLAIMS CASES

# THE UNITED STATES, PETITIONER, V. THE KAN-

[No. 43919] [92 C. Cla. 899: 314 U. S. 2121

Certicari (313 U. S. 634) to review a decision of the Court of Claims, following the decision in The Inner-Hinche Milling Company. The United States, 90 C. Cla 37; the Court of Claims in the instance uses awarding damages to the flour mills company on a contract for the sale special contraction of the contract of the court of the court States to offers upwarents made by it on carrier contracts to cover processing taxes which were subsequently held to be uncontitutional so that the vendor was not obliged to pay

The decision of the Court of Claims in the case of Kansas Flour Mills Corporation was reversed on December 8, 1941, the Supreme Court deciding:

Contracts for the purchase of floor by the Government included as part of the price any federal tax theretofore imposed by Congress applicable to the mateches of the proposed or changed by Congress \* Atter the date set for opening of bids and were paid to the Government by the contractor on the applies contracted of the contractor of the applies contracted accordingly. Held, that the subsequent decision in Cuided States v. Butler, 29 U. S. I., aliquiging the processing tax void, and the recognition of that holding through provisions of the Bereauch Art of 1986, amounted to a "change" of the vendor's tax liability made "by Congress," within the meaning of the contract, and that amounts paid by the Government as part of the contract price to offset processing taxes presumptively payable by the vendor but which because of that decision the vendor but which because of that decision the vendor but when the processing taxes are to the thirt of the processing taxes are to the processing taxes are the processing taxes are to the processing taxes are the processing taxes are to the processing taxes are the processing ta

Mr. Justice Roberts delivered the opinion of the Supreme Court, as follows:

Between May 1935 and January 6, 1936, the respondent entered into eight contracts for the sale of flour to the United States. Deliveries were duly made and the contract price was paid.

Each of the eight contracts provided:
"Prices set forth herein include any Federal tax here-

tofen imposed by the Congress which is applicable to the material portused under this contract. If any size tax, processing tax, adhestment change or other insees tax, processing tax, adhestment change or other insees the contract is based and made applicable directly upon contract is based and made applicable directly upon covered by this contract, and are paid to the Government by the contractor on the articles or supplies herein will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on

Under the terms of the Agricultural Adjustment Act, processing taxes were due, in respect of the flour sold, aggregating \$28,419.20.

In 1996 the respondent entered into four contracts for the sale of flour and bran to the United States for a total price of \$25,288.11. The commodities were delivered and vouchers for the purchase price tendered to the General Accounting Office. Payment was withheld by the Comptroller General, who notified the respondent that the Government had overpaid it in the sum of \$25,419.20.

The respondent had obtained an injunction against the collection of any processing taxes from it and, as a result of the decision in *United States v. Butler*, 297

<sup>2</sup> U. S. C. Supp. V, Tit. 7, § 609.

U. S. 1, paid no processing taxes on the wheat used in

the manufacture of flour covered by the 1935 contracts. The respondent used in the Court of Claims to recover the purchase price under the four 1903 contracts, arising out of the eight 1935 contracts. Judgment of the second of the eight 1935 contracts. Judgment was rendered in favur of the repondent for 982,288-11. 29 Ct. Ch. 263. We granted certonic because of the ing cases involving the same question. We are of opinion that the respondent was not earlief to treverve.

The contracts are to be construed in the light of the relations between the parties at the time they were executed. The Agricultural Adjustment Act did not excount a vendor to the United States from the processing tax; and a Treasury Regulation required that he pay the tax. The quoted clause shows that this tax was specifically in the minds of the parties, for it was stipulated that it was included in the price bid. The Government stood in a dual relation to the respondent. It became, at the same time, a purchaser at the named price and also a claimant of the processing tax upon the material purchased. The stipulation was evidently made in view of the facts that the purchasing officer could not buy the goods tax-free and that the Government desired that the price to it should be ex-tax. To accomplish this the sale price was pro tanto offset by the amount of the tax. Plainly, if the United States had not been thought entitled to collect the tax, the bid price would not have been acceptable. Plainly, also, if the respondent had not been thought liable for the tax, the bid price would have been less.4 As disclosed by the contracts, the understanding was that the price would have been less by the amount of the tax. The respondent disputes this, contending that we cannot say how much of the tax it was willing to absorb in order to obtain the contracts; that it may have been making the sales at an actual loss. But this is not the theory of the contracts. They provide that if, in future, any existing tax described therein is changed by Congress, the price named in each contract "will be increased or decreased accordingly." This does not mean, as contended by respondent, that the amount of increase or decrease is an

Usited States v. Hopen & Oushing Co., 115 F. 22 849; Lenert-Hische Milling Co. v. United States, 90 Ct. Cls. 27; United States v. American Poeting & Provision Co., 122 F. 24 448.
 Regulations St. Art. 9, under the Agricultural Adjustment Act.
 Commer United States v. Glova L. Mettin On. 398 U. S. 32.

unknown quantity to be made definite and certain by proof. It means that the amount of any increase in tax shall be added to, and the amount of any decrease sub-tracted from, the contract price. This view is strength-ened by the provision for separate billing of the increase, if any.

The respondent, however, argues that, under any construction, the Government is not entitled to maintain its set of the respondent that it will pay the tax, and, seeendly, that, even if they do, the stipulation for reduction of price applies only to changes by Congress and excludes relief from the tax by an adjudication that the exaction is unconstitutional.

In support of the first proposition, the respondent relies on numerous decision bolding tac clauses in privvate contracts not to require adjustment of the contract. These go on the absence of an express provision respecing the constitutional validity and upon the omission of price. We think they are mappitable in the present case since the tax clause here had a purpose different purpose here was to deprive other party of the advanage or disadvantage resulting from the incidence of the tax; and, therefore, it was supplied to eliminate the

In the case of private contracts, the 'vendees purchase for resale and the tax burden assumed is passed on to their customers. The fact that the processor—the vendor—is protected from the payment of the fax by injunction does not reduce the price to the vendee or to purchasers from him. The couris will not permit the of the amount of tax which he has passed on to his ensures. In the contracts in question, the Government than the contracts in question, the Government was the contracts in question, the Government than the contracts in question that the contracts in question that the contracts in the contracts in question that the contracts in the contract in question that the contracts in question that the contracts in the contract in question that the contracts in question that the contracts in question the contracts in question that the contracts in question the contracts in question the contract in question the contracts in question the contract in question the question that the question that question the question that questi

forcing a function of 1270 to 34 db (clip Stellay Co. 20 cased furtises of pleasage Co. 37 by Stellay Co. 30 cased furtises of pleasage Co. 37 by Stellay Co. 30 cased furtises of pleasage Co. 37 by Stellay Co. 30 cased furtises of 110 db), 14 S. W. 31 TS. (vote 1110 v. 80 cit) Package Co. 38 box. 44 (1000 cit) 14 S. W. 31 TS. (vote 1110 v. 80 cit) Package Co. 38 box. 44 (1000 cit) 15 co. 30 cit. 30 cit.

did not buy for censle. Unless it received the tax is suffered a definite dusticatings. Its purpose, an show by the contracts, was to behave the tax element in the which could not pussed to the contract, was to behave the tax element in the which could not pussed to the contract to the contract to the contract to the contract to against a fall in the market price but against presents; in purpose on the tax on reads, was thus presented, and the present the contract to the co

In its second position, the respondent attempts to meet what has been aid as to the inequity of its retaining the full priev, when it escapes paying the tax, with the argament that the result is inertiable under the contracts. It refers to the fact that it had already obessing tax when some of the 1835 contracts were made, and asserts that, if the Government desired to provide against a decision that the taxing act was unconstitutional, this could realily have been done by the addition of a single phrase.

As we must said, river a leepentine thindry, the position that tax classes in private contracts do not we think the properties of invalidity of the statute. We think the present instance. Here, legislation recognizing the decision in United States v. Butler, supra, and imposing taxes on the enrichment of these who passed on the amount of the tax without having to pay it, may properly be said to have been a change of the tax by Con-

gress within the terms of the contracts.

The decision in the Butler case was rendered January 6, 1936. It is true that after that decision a taxpayer's right to an injunction against the collection of the tax was clear. But, by the Revenue Act of 1936, to which became a law June 22, 1936, Congress not only read.

nized the effect of that decision as doing away with the "10 Dutled Blate" v. Assrcians Fashbay & Provident Co. 122 F. 24 440, the base the inverse of the provident Co. 122 F. 24 440, the base her inverse on the ground that the weeds and received nave from 10 persons to the provident control of the provident Co. 12 Co. 12

tax in question but legislated with respect to the consequent rights and remedies of those who had paid the tax and the liability of those who had passed on its burden and escaped payment.

By This III a tax is haid on the unjust enrichment consequent upon the passing on to contonent he bursconsequent upon the passing on to contonent he bursant (4) (5), Congress defines the date of terminators of the tax as "in the case of a Fechical excise tax held invalid by a decision of the Supreme Court, the date tive to floor stack taxes which recognize the invalidity of the Agricultural Adjustment Act by researching the green to January 6, 1980, the date of the Bullet edision, 8 (60) (4). The title defines a twable commodity as one on which a processing two was provided for as

§ 602 (c) (1).
Title VII makes provision for the refund of processing taxes collected under the Agricultural Adjustment Act and is a recognition by Congress that the taxes were

Thus, a change in respondent's tax liability has been recognized and confirmed by Congress. Even though this legislative action was a confirmation of or acquise-cence in the Butler decision, and although its effect may have been merely cumulative, it amounted to a change made by Congress in respondent's liability for the tax, within the meaning of the contracts.

The judgment is reversed.

# THE UNITED STATES \*. NUNNALLY INVESTMENT COMPANY

[No. 42389]

[92 C. Cls. 358; 314 U. S. 702]

Income tax records and returns on a cash basis; suit on different issues not estopped by reason of prior case. Decided January 6, 1941; indement for the plaintiff.

Defendant's petition for writ of certiorari denied by the Supreme Court May 26, 1941; 313 U. S. 584; 93 C. Cls. 778. Upon defendant's petition for rehearing the Supreme Court on December 22, 1941, issued an order as follows:

The petition for rehearing is granted. The order denying certiorari (313 U. S. 584) is vacated and the petition for writ of certiorari is granted.

# J. A. ZACHARIASSEN & CO. v. THE UNITED

INo. 433721

[94 C. Cls. 315; 315 U. S. —]

Detention of foreign-owned vessel in wartime; refusal of clearance, exercise of war powers.

Decided June 2, 1941; petition dismissed. Plaintiff's mo-

tion for new trial overruled October 6, 1941.

Plaintiff's netition for writ of certiorari denied by the

Supreme Court Murch 9, 1942.

#### THE FIFTH AVENUE BANK OF NEW YORK, TRUSTEE v. THE UNITED STATES

[No. 45046]

Income tax; date for determining holding of bonds by trustee under revocable trust.

Decided November 3, 1941; netition dismissed.

Plaintiff's petition for writ of certiorari denied by the Supreme Court March 30, 1942.

# JOSEPHINE V. HALL v. THE UNITED STATES [No. 44924]

[95 C. Cis. 539; 316 U. S. --]

Income tax; depreciation; amortization; recoupment. Decided February 2, 1942; petition dismissed. Ante, p. 539.

Plaintiff's petition for writ of certiorari denied by the Supreme Court April 6, 1942.

# STATES

[No. 455221

[95 C. Cls. 455; 316 U. S. --]

Right to sue for salary where employment was terminated on charges. Decided January 5, 1942; petition dismissed. Anto, p.

455

Plaintiff's petition for writ of certiorari denied by the Supreme Court April 27, 1942.

#### INDEX DIGEST

ACCEPTANCE OF BID. See Contract XXX. See Taxes II. III. ACT OF FEBRUARY 16, 1863. See Indian Claims XX. ACT OF JULY 15, 1870. See Indian Claims XXI, XXII. ACT OF JANUARY 12, 1923. See Pay and Allowances IL.

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ADMINISTRATIVE INTERPRETATION. See Pay and Allowances XV. ADVERTISING FOR BIDS.

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AGRICULTURAL ADJUSTMENT ACT.

I. Where, under a Marketing Agreement between plaintiff, a nonprofit organization, and its memhere on the one hand, and on the other, the United States, acting through the Secretary of Agriculture, for the disposal of the wheat surplus in 1933. entered into in accordance with the provisions of the Agricultural Adjustment Act, the plaintiff, with the approval of the Secretary of Agriculture. as required by said act, sold certain shipments of flour to the United States Government, packed and sealed for shipment to and for use in the Philippine Islands; and where all the transactions by the plaintiff with the Government, in connection with which the instant claim arose, were proposed and carried out by plaintiff and its members concerned with the knowledge and consent of the Secretary of Agriculture through his authorized representatives; it is held that said sale comes 222

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AGRICULTURAL ADJUSTMENT ACT-Continued.

within the provisions of sections 10 (f) and 17 (a) of the Agricultural Adjustment Act defining exportations of sericultural products to include exportations to the Philippine Islands, and plaintiff is accordingly entitled to recover. North Pacific Emperages: Express 430

II. Where plaintiff, a manufacturer of hosiery, filed a claim for refund of floor stocks tax paid under the

Agricultural Adjustment Act, and where said claim was rejected by the Commissioner of Internal Revenue on the ground that the claim did not comply with the requirements of the Revenue Act of 1936, under which act said claim was filed. and that said claim did not comply with the applicable Treasury Regulations under said act; and where plaintiff in filing its claim or at any other time did not submit to the Commissioner any evidence in support of said claim, as required by the statute and regulations; it is held that, no proper claim having been filed with the Commissioner in compliance with the statute and pertinent regulations, the Court of Claims is without jurisdiction and plaintiff's petition is accordingly dismissed. Marristown Knitting Mills Inc. 552. III. The requirement that a claim for refund be filed with

111. The requirement that a claim for refund be filed with the Commissioner before litigation may be instituted "is a familiar provision of the Revenue Laws." District State v. First & Turrent Co., 283 200, cited also Feature & Finance Co. v. AIRPLANE LANDING MECHANISM. 707. 1d.

ALLOTMENTS TO FREEDMEN.

See Indian Claims XII, XIII, XIV, XV,

ALTERNATIVE CLAIM.
See Indian Claims IX.

AMORTIZATION.
See Taxes IX.
ANTICIPATION

See Patents XVI, XVII, XVIII, XX, XXI, ARMY OFFICER, PROPERTY OF.

J. Where a commissioned officer in the Regular Army of the United States was retired for disability incident to the service; and where under proper orders he was relieved from assignment and duty at his then post and directed to proceed to his home; ARMY OFFICE, PROPERTY OF-Continued.

and where in the shipment of his household goods and other personal property from said post to his home said household goods and property were damaged; it is held that plaintiff is entitled to recover under the provisions of section one of the Act of March 4, 1921 (41 Stat. 1486; U. S. Code, tills 31, section 218). Polyton 187.

II. An officer acting under military orders is "in the military service" within the provisions of the Act of March 4, 1921. Id.

of March 4, 1921. Id.

III. In the instant case the plaintiff was traveling "under orders" and his property was being "transported by the proper agent or agency of the United States

Government." See Regnier v. The United States, 92 C. Cls. 437. Id. AUTOMOBILE ACCESSORIES

See Taxes XXIII, XXIV. CASH AND NOTES AS INCOME.

See Taxes IV, V, VI, VII. CHANGES IN PLANS.

See Contracts XXIV.

CLAIM TIMELY FILED.

See Taxes VIII.

CLAIM VOLUNTARILY TRANSFERRED.

See Cotton Linters Contract I, II.
"COMMERCE" AND "INDUSTRY."
See Taxes XXVII. XXVIII. XXIX. XXX.

CONFLICTING PROVISIONS IN STATUTE.

CONSEQUENTIAL DAMAGES.

See Dredging Of Navigable Channel I, 1V; Taking Of Private
Property I, II, III.

CONTRACTING OFFICER

See Contracts XIV, XIX. CONTRACTS.

I. Under the facts disclosed by the record, the provisions of plaintiff contrast, the representations of the defendant's contracting officer as to the period during which the general construction work would be performed, and the statements and relating to all work upon the entire project, upon all of which plaintiff had a right to rely, and difrely, in making in bid for formishing and installing plaunibing, heating, and ventilating equipment at Torou. Mains: it is held that plaintiff is entitled to Torou. Mains: it is held that plaintiff is entitled to

CONTRACTS-Continued. recover \$9.349.95 of the total excess cost of \$26,-044.64 incurred by reason of delay due to defendant. Rice and Burton, Receivers, 84.

II. Time was an essence of plaintiff's contract with defendant, and nowhere in the contract or specifieations for the work covered by said contract nor in defendant's contract and specifications for construction of the building in which plaintiff was to perform its work was the defendant relieved of responsibility for a liability to plaintiff for excess costs by reason of delay for which plaintiff was in no way responsible. Wood et al. v. United States.

258 U. S. 120, and similar cases distinguished. Id. III. The fact that a condition encountered, which causes delay, is unforeseen or unanticipated does not render the delay unavoidable and is not enough to relieve the contracting party, whose contractual duty it is to overcome it, from responsibility for damages to the other party from the delay caused by such conditions. Carnegie Steel Co. v. United

States, 49 C. Cls. 403, affirmed 240 U. S. 156, cited. Id. IV. Where plaintiff entered into a contract with the Government to furnish all labor and materials

and to perform all work required for the construction of a complete steam-generating plant, to be known as the Central Heating Plant for Public Buildings, in the District of Columbia; said contract including furnishing and installing all pecessary electrical wiring, as set forth in the encelfications, and for which electrical work plaintiff contracted with a subcontractor, which subcontractor based its bid on wiring and insulation approved by the National Electrical Code, as called for under one paragraph of the original specifications; and where said original specifications were carelessly written and contradictory; and where under amended specifications plaintiff was required to install, and did install, a more expensive insulation: it is held by the court that the ambiguity in the original specifications should be resolved in plaintiff's favor, and plaintiff is entitled to recover. Rust Engineering Co., 125.

V. Where the anecifications are carelessly written and ambiguous, contractor is not licensed to disregard such portions as are plain. Id.

95 C. Cla

- VI. If an owner invites bids for an illegal installation, the bidder is not privileged to submit a bid, and, if it is accented, claim that he has a contract for a much cheaper lawful installation. Id.
- VII. Where defendant, without advertising for bids, as required by law, contracted with plaintiff for the manufacture and delivery of airplanes of a certain type developed at its own expense by plaintiff: and where plaintiff did manufacture and deliver such airplanes in accordance with said contract; and was paid therefor, except, however, for a deduction withheld by the Comptroller General purporting to reduce the price of said airplanes to the audited direct costs of labor and materials plus 10-percent profit; it is held that the cost of said airplanes, properly computed, should include a proportionate part of the cost of developing such model of airplane, and the plaintiff accord-
- ingly is entitled to recover. Douglas Aircraft, 140. VIII. Where plaintiff in developing a new type of sirplane did not set up on its books development costs. and where the need for secertaining and recording such development costs arose from the failure of defendant to advertise for hids, as required by law, before awarding to plaintiff certain contracts for the particular type of airplane in question; it is held that plaintiff's claim should not be dismissed because of indefiniteness of proof unless the proof is really so indefinite as to make an
  - intelligent judgment impossible. Id. IX. In computing development costs, where no record of such costs was kept, changes in conditions, including fluctuations in the cost of labor and material during the period of development, may be taken in account. Id.
- X. Under a contract entered into by the plaintiff to furnish all labor and material and perform all work required for the construction of a movablespan highway bridge over the branch channel of the Chesapeake & Delaware Canal at Delaware City, Del.; it is held that the plaintiff is not entitled to recover for excess costs and damage alleged to have resulted from misrepresentations as to character of material to be encountered in the performance of the work called for by the contract nor for alleged extra work nor for liquidated dam-

ages alleged to have been erroneously withheld by the defendant for delay in completion of the work. Triest & Earle, Inc., 209.

XI. Where it is shown by the evidence that the conditions encountered by the plaintiff in excavating for the east pier were not different from what might reasonably have been expected from an examination of the specifications and drawings; and where it is shown that the information recorded by the defendant and made available to bidders fairly represented the nature of the material to be excavated and the conditions to be encountered; it is held that the increased cost incurred by the plaintiff by reason of the difficulties encountered was due to plaintiff's failure to interpret properly the data furnished by the defendant and not from any misrepresentation by the defendant por defendant's failure to furnish plaintiff with all the information had by defendant. Id. XII. Where in the construction of the west pier additional

work was required by the contracting officer and

- plaintiff was granted extra time therefor and was paid the agreed compensation therefor; it is Add that the proof does not sustain plaintiff's claim that plaintiff should have been paid more. Id. XIII. It is shown by the evidence that the decision of the contracting officer holding plaintiff responsible for 80 days' delay was correct and liquidated
- damages were accordingly properly deducted therefor in accordance with the terms of the contract. Id.

  XIV. Where the plaintiff entered into a wristen contract with the defendant for performing a certain

with the detendant for performing a certain amount of artist tower on the construction of a Mississippi River leves, according to specification of the control of the control of the control had been nearly completed the contracting officer for defendant issued an order for additional work and stated in the order that "payment for additional yacking made necessary would be contractly provided that if any changes were made in the contract are equitable adjustment should be made, whell provision of the contract was divergenced by the contracting officer; it is hold—

1. That the defendant made no adjustment of plaintiff's claim and thereby breached the con-

tract. 2. That the determination of what is an equitable adjustment is one of law and the contracting officer, authorized by the contract to pass only on questions of fact, had no authority to pass on said question of law.

3. That the decision of the contracting officer in his order that "payment for additional yardage will be made at contract price per cubic vard" was that the contract price applied to the additional work and that this was not in any sense a decision

upon a fact but it was in effect a conclusion of 4. That the defendant, having breached the con-

tract by the refusal of the contracting officer to make any adjustment, the plaintiff could bring suit without taking any appeal, as the contract provisions for appeal applied only to the decisions of the contracting officer on questions of fact; there was no adjustment from which to take an appeal.

Callahan Walker Construction Corn., 314. XV. An implied contract arose to pay the plaintiff the reasonable value of the extra work performed. Id. XVI. The agreement, as to the extra work, between the

nlaintiff and its subcontractor had no bearing upon the contract between the plaintiff and the defendant Id.

XVII. Where extra work is ordered by the proper officer of the Government, such extra work being necessary, and where it is accepted and used by the Government the Court of Claims has held that there is an implied contract to pay the contractor the reasonable value thereof unless there is a provision in the contract directly forbidding payment in the circumstances of the case. United States v. Spearin. 51 C. Cls. 155, affirmed 248 U. S. 132, 139 cited.

XVIII. The question whether an equitable adjustment is made is for the court to decide. Id.

XIX. Where it was provided in the contract on which the instant suit is brought that "no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order';

and where it is shown by the evidence adduced that not only the work in question was not ordered by the contracting officer but also plaintiff was informed that if done it would not be paid for; it is held that the plaintiff is not entitled to recover. Hardwisc. Aduter. 336.

- XX. Where plaintiff, in response to Invitation of defendant, submitted a Molf for furnishing coal; and where on shew Ni. I obtainful attained to and of \$3.75 per ton, and on shew No. 10 of and schedules a bid price of \$1.75 per ton was entered; and where on any other to the course of the conlated was supported by the course for said coal and where on and bid the courses for said coal and where on and bid the courses for said coal and where on the course of the course of the about were said price of the course for said coal and where on and bid the courses for said coal and where on the course of the course of the said of \$2.75 per ton; it is hadd that plaintiff is entitled to recover at the rate of \$2.75 per ton; it is hadd that plaintiff is entitled to recover at the rate of \$2.75 per ton; it is hadd that plaintiff is
- submitted. Skepard, 407.

  XX. Where in a contract with plaintiff, drawn by the defendant, for the rental of one hydraulic dredge and equipment, it was provided that rental at a price signal and the state of the st
- Dredging Co., 421:

  XXII. A contract drawn by the defendant is to be strictly
- contraved against it. Id.

  XXII. Where plasmidt, a contraction, entered into a contract with the Government for the construction of a white for the contraction of a white for the contraction of a where the preparation of plasmid contraction was hastily door; and where after the contract was made thougerists were supplied to plainful of the plasmid of the plasmid of the plasmid or revised bioperial containing all the insertions was ever given to plaining; it is held that there is no proof that the condition of the plasmid plasmid

Great Labes Construction Co., 479.

95 C. Cls.

CONTRACTS-Continued. XXIV. Where during the progress of the work on the Federal

penitentiary being constructed near Lewisburg. Pa., the Government made frequent changes in the plans, in addition to insertions and corrections on the blueprints and where the contract expressly permitted the Government to make such changes with proper compensation to the contractor, and where in connection with each such change a supplemental contract was entered into by the parties: it is held that the said supplemental agreement left no further unliquidated elaim by which the plaintiff can recover for overhead, profit, or delay. Id.

XXV. Where a plaintiff has been legally wronged, indefiniteness of proof as to the exact amount of damages will not prevent a recovery (Mangheld & Sons Co. v. United States, 94 C. Cla. 397) but there must be tangible evidence of substantial damage. Id.

XXVI. Where plaintiff, a contractor, entered into a contract with the Government for the erection and completion of one set of five special skeleton steel radio masts with concrete foundations; and where before submitting its bid plaintiff inspected the site: and where plaintiff agreed to a change of site with no increase or decrease in price; and where in excavating for foundations water was struck, necessitating additional expense; it is held that plaintiff is not entitled to recover. Cassidy

& Gallagher, Inc., 504. XXVII. The Government made no representations as to conditions at the site other than as disclosed by the proposal conditions, the specifications, and other contract provisions; there was no concealment, no withholding of information, and conse-

quently no reliance. Id. XXVIII. The plaintiff's method of meeting the conditions encountered was inefficient and not in accord

with good engineering practice. Id. XXIX. Where, in response to advertisement by the Procurement Division of the Treasury for bids for the furnishing of a rock-crushing plant on an hourly basis and in the alternative on a cubic-yard basis, plaintiff, a contractor, submitted bids, which were accepted; and where upon inquiry plaintiff was referred for information as to the work and conditions under which it was to be performed to a

representative of the Works Progress Administration, who informed plaintiff that the crusted rock would be removed promptly by the defendant from the crushers and would be piled in stock piles so that there would be no delay to plaintiff in the crushing of the rock; and where the crushed rock was not so removed but was allowed to accumulate in the bunkers; and where delay and extra separas were thereby caused to plaintiff; its Add that plaintiff is accordingly entitled to re-

cover. Kunes, 512.

XXX. Where plaintiff offer to crush the rock was made on condition that the bid be accepted within it days from the opening of the bids, and where the contract was supported by the contract to the contract was entered into when said bid was contract was entered into when said bid was contract was entered into when said bid was contract was entered into one and plaintiff prepared to resulterer of his intention to do so and did perform senterer of his intention to do so and did perform

the work. Id.

XXXI. Where the work was not completed within the specified time; and where, thereupon, defendant presented to plaintiff a renewal of the contract which plaintiff accepted; it is held that this "renewal" was a recognition of the original

contract. Id.

XXXII. It was an implied condition of the contract that defendant would not delay plaintiff in the perform-

ance of the work. Id. XXXIII Where plaintiff entered into a contract with the Government for the construction of six culverts. outlets from Lake Okeschobes in Florida, to control the level of water in the lake so that it would be adequate for navigation and not so high as to flood the surrounding land; and where difficulties in the construction of one of said culverts resulted from the fact that the mud in the bottom of the lake was so light as to afford little support to the stude which were driven into it, the rock ledge on which the mud rested was so hard that the wooden studding would not penetrate it, and the steel sheeting which might have penetrated the rock would have been too expensive for the price plaintiff had bid on the job, and it was necessary to bring rock in barges to support the cofferdam; it

is held that the resulting delay and extra expense were not the fault of defendant, and plaintiff is accordingly not entitled to recover. Thomason,

XXXIV. A notation on a drawing showing the contour of the lake bottom and the type of soil which a contractor might expect to find there, and showing the surface of the water as a certain depth above sea level. did not amount to an agreement by the defendant that the water would be maintained at that depth.

#### Id CONTRACTUAL RIGHTS UNDER TREATY. See Indian Claims XVII.

## COTTON LINTERS CONTRACTS.

I. The instant case, referred to the Court of Claims by Senate Resolution, under which a number of cases, representing claims arising out of contracts made with pottonseed oil mills at the time of the World War, were so referred, presents facts similar to the facts in a number of such cases in which judgment has been rendered in favor of plaintiffs (See Hazelburst Oil Mill & Fertilizer Co. v. United States, Congressional No. 17453, 70 C. Cls. 334; Farmers & Ginners Oil Co. v. United States, Congressional No. 17357, 76 C. Cls. 394) except that in the instant case plaintiff is not the original party with whom the United States made the contract upon which liability, if any, arises; and it is accordingly held that the voluntary transfer to plaintiff of the claim in question. growing out of the cancellation of said contract by defendant, comes within the provisions of section 3477. Revised Statutes, and plaintiff is therefore not entitled to recover. Relieve Cotton. Oil Co., 182,

II. Where the contract was made with another corporation, all of the property of which was sold to the plaintiff; and where upon such sale the plaintiff rests its title and right to the claim in suit: it is held that the plaintiff by such sale acquired no interest in the claim upon which plaintiff is entitled to bring suit against the United States. 14

#### DAMAGES

DECISION IN PRIOR SUIT.

See Interest on Allowed Claim VI.

DELAY.

See Contracts I, II, III, X, XXIX, XXXIII.

See Contracts I, II, III, X, XXIX, XX DEPRECIATION.

See Taxes IX, X, XI.
DESCRIPTION INDEFINITE.
See Patents I II III VI

DEVELOPMENT COSTS.

DREDGING OPERATIONS.

See Oysters and Oyster Beds 1, 11.

DREDGING OF NAVIGABLE CHANNEL.

I. Where the Government in 1937 commenced dredging operations in the navigable channel between the Hudson and East Rivers, known as the Harlem River Canal, adjacent to the property on the waterfront of said canal belonging to the plaintiff and used by the plaintiff as a coal yard; and where shortly thereafter cracks and breaks appeared in the surface of said coal yard, and the land began to settle before dredging operations in the vicinity were discontinued: it is held that there was no taking by the defendant, constructive or otherwise, of plaintiff's property; and that any damage to said property to which defendant's authorized dredging operations may have contributed was indirect and consequential to the exercise by the defendant of its lawful right in maintaining a navigable waterway, and plaintiff accordingly is not entitled to recover. Roden Coal Co., et al., 219.

II. The defendant did not in any way encreash upon the properly rights of plaintiff, and under the fact disclosed, there is no justification for application of the principle of a contractive taking upon which to base an implied promise to pay just compensation under the Fifth anneament, measured either by the value of the property or by the difference between the market value thereof before ference between the market value thereof before and after the operations by the defendant. Id. III. The plaintiff acquired the property subject to the

III. The plaintiff acquired the property subject to the undeniable right of the United States to maintain a navigable waterway at the authorized depth and width. Id.

#### DREDGING OF NAVIGABLE CHANNEL-Continued.

IV. Whatever effect the defendant's dredging operations. may have had upon plaintiff's property, the resulting damage was indirect and consequential to the exercise by the defendant of a lawful power. United States v. Lynah, 188 U. S. 445, and United States v. Cress, 243 U. S. 316, distinguished. Id.

V. The act of Congress authorizing the maintenance of the Harlem River Canal did not assume any obligation to pay for damages which might result to property owners as a consequence of such maintenance; and the claim of plaintiff cannot, therefore, he said to be one arising under an act of

Congress. Id. VI. In order for the Court of Claims to entertain a suit against the Government and to enter judgment the statute upon which the claim is based must grant the right asserted. Id.

See also Oysters and Oysters Beds. ELECTRICAL ENERGY TAX.

See Taxes, XXVII, XXVIII, XXIX, XXX. EMERGENCY TRANSPORTATION ACT.

See Interest On Allowed Claim II. "ENGAGED IN BUSINESS."

See Turns XIV EQUITABLE ADJUSTMENT.

See Contracts XIV, XVIII. ERROR IN BID.

See Contracts XX. ERRONEOUS CONVICTIONS.

I. The Act of May 24, 1938, an act to grant relief to persons erroneously convicted in the Federal Courts, applies only to acquittals or pardons after the passage of the act. Viles. 591.

II. In the instant case, it is held that the pardon does not contain the recitals called for by the Act of May 24, 1938. Id.

EXCESS COSTS See Contracts I. II. X. XI.

EXCLUSIVE USE AND OCCUPANCY. See Indian Claims XXIII, XXIV, XXV, XXVI, XXVII, EXTRA EXPENSE.

See Contracts XXIII. XXVI. XXIX. EXTRA WORK.

See Contracts XIV. XVII. XIX. FIFTH AMENDMENT.

See Taking Of Private Property I, II, III.

"FIRST" RETURN.

GOVERNMENT LIABILITY ADMITTED, See Oysters and Oysters Beds II.

ILLEGAL INSTALLATION.

See Contracts IV, VI.
IMMEMORIAL POSSESSION.

See Indian Claims VI.
IMPLIED CONDITION.

See Contracts XXXII.
IMPLIED CONTRACT.

See Contracts XV, XVII.

See Contracts XXIII.
INDEFINITENESS OF DAMAGES.

See Contracts XXV.

INDEFINITENESS OF PROOF.
See Contracts VIII.

INDIAN CLAIMS.

 Plaintiff sued the defendant for \$3,266,825.22, basing its claims on four items:

 Failure to pay to the tribe the amount received from the sale of lands within what is known as the "Old Agency Reserve" or the "Langford Claim";

(2) Failure to pay to the tribe money received from the sale of lands allotted erroneously to nonmembers of the tribe and later canceled:

(3) Per capita payments erroneously made to nonmembers of the tribe:

(4) For gold mined and removed by nonmembers of the tribe from lands alleged to be within the plaintiff's reservation.

plaintiff's reservation.

The case was before the Court under Rule 39 (a),
and it was held:

(1) That plaintiff was not entitled to recover the amount received from the sale of, or for the value of, the lands in the "Old Agency Reserve" which were purchased by the defendant.

defendant.

(2) That plaintiff was entitled to recover the value of the number of seres of canceled allotments which were opened to homestead entry by the proclamation of the President on November 8, 1895 (29 Stat. 873, 876) with interest at 5 percent per annue.

- (3) That plaintiff was entitled to recover whatever part of the \$1,626,222 was paid to nonmembers of the tribe and for which the defendant has not accounted to the plaintiff, with interest at 5 percent per angue.
  - (4) That plaintiff was not entitled to recover the value of any gold removed from its reservation. Nex Perce Tribe, 1.
    II. Where there is no allegation that white people went
  - upon plaintiff's lands at the direction of the defendant, or even at defendant's instigation; and where liability is prediested solely on the defendant's failure to keep out and white premon; it is held that from the language of the treaty of 1856 it excannot be inferred that the defendant intended to the state of the state of the state of the state of the reservation and that defendants should reapend in damages of they did. Id.
  - III. Independent of treaty, the defendant as the sovereign power was under the duty of protecting the plaintiff in the passed of occupation and possession of its property but this duty goes no further than to use its forces to the duty goes no further than to use its forces to the duty of the result of the source of the property but the duty of the
    - IV. Where, on June 11, 1855, a treaty was concluded between the defendant and the Nes Perce Tribe of Indians, by which much of the land of the tribe was ceded to the defendant, the land not ceded being expressly set aside as a reservation for the said tribe; and where said treaty was signed on behalf of the Indians by Principal Chief Lawyer and the chiefs of the various bands, including Joseph, the chief of the plaintiff band, who was the third Indian signer; and where the land claimed in the instant suit was included in the Nez Perce reservation of said treaty; it is held that there was nothing in said treaty of 1855 which either recognized any title in plaintiff band to, or gave to that band or any other band title to, specific parts of the land reserved to the Nez Perce tribe
  - by said treaty. Joseph's Band, 11.

    V. The conduct of the then chief of the plaintiff band, the elder Joseph, in participating in the negotiations and signing the treaty of 1885 shows that

- there must have been power in the tribe to act as a whole with reference to all lands of the tribe or of any of its bands. Id.
  - VI. Where claim of title to the Wallowa area is based on alleged immemorial possession by plaintiff band, it is skelf that it does not appear from the evidence that Joseph and his band ever had exclusive possession of said Wallowa area. Id. VII. Where in 1863 a treat with the Nex Perce Indians
  - was signed, reducing the reservation to a described area, and where in said travity he hard chained in the instant ruit, knosn as the Wallows reservaing the said of the said travity of the said defendant by the tribes, and where Joseph, the then chief of the plantiff band, refused to sign said travy or to recognize its building; it is held better to be said travity of 1963 and that the dissenting minority, bedding the members of the plantiff band, was bound by said traxity. While 1972 when the resemble of the plantiff band, was bound by and traxity. While 1972 when the recommendation of the
    - Commissioner of Indian Affairs the President, by Executive Coffer, withdrew/from entry the Wallows area and set it side as a reservation for the "reastines For Preve Rev Party and when because the Prevent Rev Prevent Rev Party and when because the Prevent Rev Party and when the Party Rev Party R
  - in plaintiff band. Id.

    IX. Plaintiff's alternative elaim for relief, the right to a pro-rele share of the Nez Perce income and property under the treaties and agreements of the tribe with the United States, not having been set forth in plaintiff's petition, was not properly before the court. Id.
  - X. Under the jurisdictional act of December 23, 1920 (46 Stat. 1033), authorizing the Court of Claims to hear, determine, adjudicate, and render judgment on all legal and equitable claims of whatsoever nature of the Warm Springs Tribe of Indians or of any band thereof against the United States,

# arising under or growing out of or incident to the

treaties of June 25, 1855 (12 Stat. 963), and of November 15, 1865 (14 Stat. 751), or either of them, notwithstanding the lanes of time and notwithstanding the provisions of the Act of June 6. 1894 (28 Stat. 86), it is held:

1. That the northern boundary of the reservation

set saide for the Warm Springs Tribe of Indians by the said treaty of 1855 runs from McQuinn's 20-mile post at Little Dark Butto southeast. wardly along the line established by McQuinn to McQuinn's 716-mile post, and thence in a straight line to the starting point on the De-Chutes River established by Handley;

- 2. That the western boundary of said reservation is the western boundary established by McQuinn:
- 3. That the plaintiff is entitled to recover the value of the lands between these boundaries and the northern and western boundaries established by Handley and Campbell; 4. That the plaintiff is not entitled to recover on its
- claims involving amounts agreed to be spent by defendant for the benefit of the Indians and for the erection of certain buildings and for other purposes, where it is shown by the proofs that far more money had been spent than was called for by the treaty:
- 5. That there is no proof that the bands named in the provise to the treaty of 1855 met in council and expressed a desire that some other reservation should be selected for them, as required by naid proviso. Warm Springs Tribe, 23.
- XI. The jurisdictional act (41 Stat. 738) under which this suit, and others, were brought provides that all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States "which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims." and the sole question in the instant case is whether under the terms of said set the plaintiffs are entitled to recover \$1,903,023.22 heretofore paid to said plaintiffs by the defendant under the treaty of 1888 (15 Stat 635) and subsequently charged as an offset against other claims of the plaintiffs litigated under the jurisdictional act of March 4, 1917 (39 Stat. 1195) and decided in the case of Medauakanton Indians et al. v. United States, 57 C. Cls. 357.

- The obligations of the treaty of 1868 have been complied with, and the amounts due thereunder have been paid, both in fact and in effect.
- The instant suit is based on the treaty of 1868, which has been fully complied with, and is not based on non-payment of obligations of other treaties.
- 8. Conceding that in the Medawakanton case, sayer, be covert did not pass upon the merits of the offset in question but merely followed the mandatory direction of Congress in the jurisdictional act of 1917, and thus treating the question of said offset as before the court answ in the intant case, and considering all the opposition under the principlicational act of the cognition under the principlication and the company of the complete contribution of the complete company of the countribution of the complete company of th
  - of June 7, 1924, as amended, the Chickease Matter, Saladiri, dains compensation for he one-man of the Chickease Nation, shalled in common of the Chickease Nation from the strills landed in common by the Chickease Nation and had in common by the Chickease Nation and that the arrangement of the "Ackas agreement," whereby the Chickease Freedome were to be furnished to the chickease Nation, and not of the plaintiff, was incorporated into the "supplemental agreement" of 1925 as no obligation of the Chickease Nation, and not of the plaintiff, was included the "supplemental agreement" of 1925 as no obligation of the Chickease Nation, and the Nation of the Chickease Nation, and the Nation of the Nat
- Nision, 192.

  Nilion, 192.

  NII. It is shown by the evidence addicated that the Chickamans never adopted their freedines, as provided assure never adopted their freedines, as provided Congress, and no alloisments were made to asid Chickassaw freediness (faith as add chickassaw freediness) and the control of the control faith and faith and faith and statements were paid for by the United states and these cost neither the Chickassaw size the Chickassaw state that adultments to the Chockate freediness.

common by the two nations, and hence the Chickasaws contributed to said allotments their proportion, which was one-fourth, as recognized by treaties, statutes, and practice; that the Chickssaws have consistently claimed that neither set of freedmen should be provided with land at the expense of the Chickasaws, which claim was amented to by the Choctaws in the "Atoka agreement," first, and again in the application to the Court of Claims in 1909 for a modification of the decree in the Chickgsow Freedmen case (38 C. Cla. 558: 193 IT. S. 115). Id.

XIV. The rights of the freedmen of the two nations were not regarded as settled, and were not settled, by the treaty of 1866. Id.

XV. The "supplemental agreement" of 1902, which is the determining document, provided for permanent and unqualified allotments to both Choctaw and Chickseaw freedmen, but omitted the provision of the "Atoka agreement" for deduction of said allotments from allotments to members of the respective nations, and as to the Chickenser freedmen said "supplemental agreement" provided for determination in the Court of Claims as to whether said Chicksanw freedmen were entitled to allotments from tribal lands or whether the United States should supply at its expense

said allotments to said Chickasaw freedmen. Id. XVI. Where under the provisions of the treaty of May 12. 1854, the defendant gave to the plaintiff Indians for a home a tract of land upon Wolf River in the State of Wisconsin, definitely described by metes and bounds, and containing 12 specific townships; and where prior to the signing of said treaty the Congress had passed what is known as the "Swamp Land Act of 1850," by the terms of which the swamp and overflowed lands of Arkansas and all other States, including Wisconsin, were granted to the several States; and where it is shown that there are swamp lands located within the boundaries of the reservation given to the Menominees by the treaty of 1854; it is held that the plaintiff is entitled to recover the acquisition gosts of such lands which were within the boundaries of the cession to the plaintiff by the treaty of 1854 but which had been theretofore given to the

State of Wisconsin by the act of 1880, together with the value of that portion of the timber which has been removed therefrom and for which plaintiff has not been paid: Preveidel, houver, In accordance with the terms of the jurisdictional act, that the United States "may in lites of paying the present acquisition costs of such lands acquire and hold said lands in trust for the sole benefit and use of the Menominee Tribe of Indians." Memo-

- ince Tribe, 232, XVII. Where under the decision in United States v. Minnesola, 270 U. S. 181, the title to the swamp lands embraced in the reservation ceded to the plaintiff tribe in 1854 is in the State of Wisconsin, having been granted to that State in proceenti by the act of 1850, subject only to identification by the Secretary of the Interior and patent to be issued on the request of the Governor; and where under the terms of said decision neither the Indians nor the United States on behalf of the Indians could maintain a suit against the State of Wisconsin for the legal title to the swamp lands in questionit is held that these considerations do not affect the contractual rights between the plaintiff and the defendant under the treaty of 1854. Id.
- XVIII. The plaintiff indians had purchased certain lands from the United States, had paid a valuable consideration therefor, said lands had been described by metes and bounds, and no reservation or exception had been made of any lands embraced within the houndaries of said tract. Id.
  - XIX. Treaties between the United States and the Indian Tribes must be construed liberally in behalf of the Indians in view of the relationship existing between the parties. Id.
- XX. It is held that under the provisions of the act of Drawary and the state of the state of the state of the bands of Indiana against the defendant are canceled and forfeited, and plaintiffs are not entitled to recover in the instant case. Sious Tribe (G-S3-1/51) [38]
- XXI. It is held that the distribution to the Medawakanton and Wahpakoota Bands of Indians of proceeds from the sale of reservation lands of the Sioux Tribe, upon the basis of determination by the Secretary of the Interior with respect to the pop-

ulation of the respective bands under the provisions of the Act of July 15, 1870, was a discharge in full of defendant's obligation to plaintiffs under the Acts of March 3, 1863, and July 15, 1870; and plaintiffs accordingly are not entitled to recover. Sioux Tribs (C-S31 (16)), 503.

XXII. The decision of the Court of Claims in the case of Medeuvakasion and Wahpakosta Bands of Sioux Indians v. The United States, 57 C. Cls. 357, in which the court did not undertake to make a division of the funds there involved according to

when the court out not undertake to make a division of the funds there involved according to the precise number of people in each band, as required in the instant case under the provisions of the Act of July 15, 1870, is not res judicated on the issues in the instant case. Id.

XXIII. When, in the treaty of July 30, 1883, between the

XXIII. Where, in the treaty of July 30, 1865, between the Northwestern Bands of the Sheshouse Nation or fendant did not not stated and the Sheshouse Nation or fendant did not set aside any specific area for the exclusive use and occupancy by plaintiff Bands; and where by said treaty the defendant did not set aside and where the said treaty the defendant did not except the said treaty to the set of the se

States. Northousetern Binels, 642.

XIV. Although pelantill Bands, issued as other tribes were concerned, may have netherisely occupied were concerned, may have netherisely occupied in the instance datas and the Anotoginal home cand the record is had to be sufficient to mixe the pelantic data and the short plant of the pelantic data which and are not entitled to the contract of the pelantic data and pelantic data and pelantic data and pelantic data and present data and prese

XXV. Such a claim must be one that is within the terms of and supported by the provisions of the treaty; and aboriginal occupancy and use is not such a claim. Id.

XXVI. The treaties made with the Shoshone Indians in 1863 were treaties of peace and amity, and it was not the intention of the Government to recognize. INDIAN CLAIMS-Continued by said treaties, any exclusive use and occupancy

title of the Indians to the lands which said Indians then occupied. Id.

XXVII. The question whether under the Mexican laws at

the time of the Mexican cession of 1848 plaintiff bands had use and occupancy rights-that is, "Indian title"-to certain of the land involved in the instant case based upon aboriginal possession or occupancy to the exclusion of other Indian tribes, has been decided adversely to such contention in the decision of the Supreme Court in United States, as Guardian, v. Santa Pe Parifle Railroad Co., 314 U. S. 339. Id.

XXVIII. Where, following the ratification of the treaty of

July 30, 1863, there was appropriated by Congress for the Northwestern Bands of Shoshone Indians the sum of \$5,000 annually for 20 years, as stipulated in said treaty; and where it appears from the record that the total of the amount so appropriated except \$10,804.17, was expended and disbursed by the Government in goods and provisions for said Northwestern Bands; an interlocutory order, under Rule 39a of the court, was entered reserving for further proceedings the determination of the amount of recovery, if any, in respect to said amount of \$10,804.17 after determination of the amount of offsets, if any. Id.

XXIX. Plaintiff bands are not entitled to recover interest on such deficiency, if any, in the treaty annuities, for the reason that the record does not establish that this money was taken by the United States under such circumstances as would entitle the plaintiff bands to interest as a part of just com-

pensation. The Choctaw Nation v. United States, 91 C. Cls. 320 cited. Id.

See Indian Claims XIX.

INDIAN TREATIES INFRINGEMENT

See Patenta IV. V. VI. VIII. X. XI. XII. XV. XVI. XXIII. INTEREST CLAIMED AGAINST SOVEREIGN.

See Interest On Allowed Claim III. IV. INTEREST ON ALLOWED CLAIM.

I. Where amounts allowed by legal authority and admittedly due to plaintiff for transportation services rendered by plaintiff to the Government were withheld by the Comptroller General to

apply against an alleged indebtedness of the

#### INTEREST ON ALLOWED CLAIM-Continued.

the Interstate Commerce Commission in connection with a proceeding before the Commission involving the determination of excess income of plaintiff for the calendar years 1922 and 1923 under section 15s. par. 6 of the Transportation Act of February 28, 1920; and where plaintiff denied any indebtedness to the United States in respect to the said determination of the Commission and did not consent to said off-set by the Comptroller General; and where no judgment was ever rendered with regard to the amount so determined: it is held that the plaintiff, under the facts disclosed by the record, is not entitled to recover any interest under the act of March 3. 1875, either before or after said act was amended by the Act of March 3, 1933. Rickmond. Fred-

plaintiff to the United States under an order of

by the Act of March 5, 1933. Richards, Fredreichting & Phinnes, 244.

If The discussion by Compous Temperatures of the Compous Temperature of the Compous Temperature of June 16, 1935, to amend section 16 or the Interstate Commerce Act of 1930, and to repeat anissection (6) or side section, and to free that all needs (6) or side section, and of size that all commerce Commission under said section 15s. abouted cance to be a receiverable and payable and that all precedings perinting for the receivery of judgment against the United States within the massing of the Act of March 3, 1872, that plainted was not been approximately to the compound of the was not yet to that time, incident of the

of 1920. Id.

III. The common haw rule that delay or default in payment (upon which, in the absence of an express agreement, the right to recover interest resta) cannot be attributed to the sovereign has been adonted by the Courres. Id.

IV. Interest is not to be awarded against a sovereign government unless its consent has been manifested by an act of its legislature or by a lawful contract of its exemptive officers. If

of its executive officers. Id.

V. The right to elaim and recover interest from the
United States is purely a matter of grace and all
the stipulated conditions upon which the United
States has agreed to pay the interest, or to become
liable therefor, must be strictly met. Id.

INTEREST ON ALLOWED CLAIM-Continued.

INTEREST ON ALLOWED CLAIM—Continued.

VI. In the suit instituted against the Comptroller Gen-

eral by the plaintiff for an injunction restraining the Comprision Censeral from withholding the moneys due to plaintiff and from applying said moneys to payment of amounts alleged to be due by the plaintiff to the Interestate Commerce Comnision under the order of add Commission, while the decision of the Court of Appeals of the Distret of Columbia was in effect favorable to the plaintiff, the quastion whether plaintiff was included to consider the court of the court of the court of the control of the Court of the Court of the Court of the quastion whether plaintiff was included to the court of the Court of

"IN THE MILITARY SERVICE."

See Army Officer, Property Of, L. II, III.

IRREGULAR CLAIM.

See Agricultural Adjustment Act., II. III.

JURISDICTION.

It is held that the allegations of plaintiff's petition, being vague and indefinite, and showing no promise of payment for information alleged to have been furnished to the Government, does not set out a cause of action under the provisions of the general jurisdictional act (U. S. Code, title 28, section 250) which gives the court jurisdiction to hear claims against the United States. Klatz. 179.

See also Agricultural Adjustment Act II, III.
JUST COMPENSATION.

See Dredging Of Navigable Channel II; Indian Claims XXIX.

LIMITATION IN JURISDICTIONAL ACT.

See Indian Claims XXIV.

LIQUIDATED DAMAGES.
See Contracts X. XIII.

MEXICAN CESSION.

See Indian Claims XXVII.

NATIONAL INDUSTRIAL RECOVERY ACT.

I. Where in Indiffirment of a contract with the Government for construction of 24 sirplanes the 24th and final airplane was delivered and accepted December 7, 1094, and the final airplane for constituted completion of the final airplane was constituted completion of the constituted constituted constituted constituted in the constituted of the constituted constituted with a characteristic constitute of the constituted with a letter dated August 25, 1985, and where the notarial certificate attached to and where the notarial certificate attached to and

# NATIONAL INDUSTRIAL RECOVERY ACT-Continued.

verifying said claim was dated September 3, 1985; it is had that the earliest date on which said claim could have been filed was September 3, 1985, and accordingly plasmid if not entitled to recover for said claim under the provisions of the Act of June 16, 1984, as amended by the Act of June 25, 1983, requiring that claims of contractors for increased requiring that claims of contractors for increased states of the Act of June 25, 1983, as a manned by the Act of June 25, 1983, as a second of the contract of the Act of June 25, 1983, and the Act of June 25, 1985, and the Act of June 25, 1985, and the Act of June 25, 1985, and June 2

II. Where timely claims were filed in connection with two additional contracts between plaintiff and the Government: it is hald:

Plaintiff is entitled to recover for items of increased costs incurred after November 27, 1983, in connection with employees who entered its service prior to November 27, 1933;

Plaintiff is entitled to recover for items of increased costs in connection with employees who entered its service after November 27, 1933, for the period between November 27, 1933, and June 2, 1934. Id.

NEGLIGENCE.

See Oysters and Oyster Beds III. NOTES, MARKET VALUE OF. See Taxes VI.

OFFSET ALLOWED IN PREVIOUS SUIT.

14

OYSTER AND OYSTER BEDS.

I. Where it is established by uncontradicted evidence that plaintiffe, oyder growers in Onset Bay, Mase, suffered damages as a result of dredging operations conducted by the Government in the improvement of the Cape Cod Canal; it is *held* that plaintiffe are entitled to recover under the provisions of section 13 of the Rivers and Harborn Act of 1985,

49 Stat. 1928. Schweder Basse Opster Co., 729.
II. Under the terms of the Rivers and Harborn Act of 1936 the Government not only gave plaintiffs the right to sue for damages but admitted its liability for all damages resulting to oyster growers "from dreedging operations and use of other machinery and equipment" for makine such improvements.

OYSTER AND OYSTER BEDS-Continued.

III. Under the terms of eaid act it is not necessary to prove negligence. Radel Oyster Company v. United States, 78 C. Cla. 816 cited. Mangleld v. United States, et al., 94 C. Cla. 397-440, distinguished. Id.

IV. Speculative damages are not allowable under the

# PARDONS.

See Erroneous Convictions I, II.

ATENTS.

I. Where the alleged discovery or principle which the

inventor attempts to teach the public by means of the specification in the application for patent No. 1,463,565 is dependency upon the contribution effect of centrifugal force to a degree or extra previously not contemplated by the sirplane propeller designer; it is hadd that this degree is arry vague and indefinite. Reed Propeller Co., Inc. 202.

- II. Under the patent statutes, one skilled in the art is entitled to a disclosure sufficiently clear in the specifications as to enable him to know what might be asfely used or manufactured without practicing the invention or discovery, and which might not, and to arrive at this knowledge without the necessity of experimentation. Id.
- III. Where in the claims to monopoly with relation to patent No. 1,463,556, the only distinction which the claims attempt to make with respect to the prior art is once of preporting, as indicated by use of the phrase "parity but mainly"; and where the plants monopoly is not expressed in extantee; it is held that the claims theremoter are mainlymous and the patent accordingly close not ristlit the requirement of the patent statutes and is therefore void. Id.
- IV. It is held that upon the specifications and data produced relative to the Government propeller charged as infringing patent No. 1,468,586, the claims 1, 2, 3, 4, and 13 in issue, even if they were not invalid, are not infringed by the Government structure. Id.
- V. It is held that claims 1, 5, 15, and 16, patent No. 1,518,140, insofar as said claims specify the degree or extent to which centrifugal force is employed.

## PATENTS-Continued.

fail to define a patent monopoly and said claims are not infringed by the Government structure

and are invalid. Id. VI. It is held that claim 14, patent No. 1,518,140, directed to a metal acronautical propeller with blades increasing in cross section from the tin toward the hub, is indefinite with respect to patent

monopoly, and is invalid, and not infringed by the Government structure. Id. VII. It is held that claims 11, 12, and 13, patent No.

1.518.140, being directed to the material or composition of a propeller blade, and relating to the use of duralumin therein, express no natentable invention and are therefore invalid. Id.

VIII. On the facts disclosed by the evidence adduced, pertinent to the question of validity and infringement of patent No. 2,008,931, to Charles E. Schuler, at issue in the instant case; it is held that claim 4 of said patent is invalid under the prior art; that claims 5 and 7 as specifically limited are not applicable to the alleged infringing structure, and that if said claims were so interpreted as to disregard the specific limitation contained therein they, also, would be invalid in view of the prior knowledge and uses; and plaintiff is accordingly not entitled to recover. International-Stacy Corp., 357

IX. Prior to any effective dates of the Schuler invention. patent No. 2.008,931, in suit, those skilled in the art had knowledge:

(a) That both the conductivity and dielectric constant of the earth affected the distribution of current adjacent the antenna, and that a loss of energy was likely to occur by the penetration of the lines of force through the earth to a buried ground avatem:

(b) That a variation in the pattern of the radiated waves from the antenna would be caused by variations of conductivity in various portions of the ground under or adjacent to the base of the antenna; (c) That a metallic ground screen located under the antenna, elevated above the surface of the ground, and grounded at various points in its periphery, would function to reduce the effects set forth in items (a) and (b) and would therefore return or reflect energy to the antenna which would otherwise be lost. Id.

## PATENTS-Continued.

- X. The bondfall effect of ground sereous located at the base of the antennas was will form to those skilled in the sat, and to utilise such a ground as the sate of the sate of the sate of the sate of the notion of the sate of the sate of the sate of the top force any novel or unforcessor result and not produce any novel or unforcessor result and would not trovive invention and claim 4 is since as accordingly invalid. If the sate 7 are so as a coordingly invalid. If the sate 7 are so as a coordingly invalid. If the sate 7 are so as a coordingly invalid. If the sate 7 are so as a coordingly invalid. If the sate of the sate 7 are as a coordingly invalid. If the sate of the sate of a sate of the sate of th
- acreens located at the base of the antenna. Id.

  XI. The proof abows that the radio autenna ground
  screen claimed in the patient in suit is the same,
  or substantially the same, as ground screens
  previously described and used, and that it performs the same function in the same way to obtain
  the same results. Id.
- XII. That which would infringe if later will anticipate if earlier. Id.
- XIII. The plaintiff cannot assert a broad construction of its claims in order to make out a case of infringement and then narrow its claims so as to avoid anticipation. Id.
- XIV. Where on August 25, 1941, the defendant filed a motion in each case in suit asking "for an order requiring the plaintiff to elect between the two inconsistent claims for compensation allegedly resulting from one and the same act (the use of certain radio equipment) as set forth in the petition:" and where on September 6, 1941, an order was made by the court directing plaintiff "to elect whether he will prosecute his claim as a breach of contract, or under the invisdictional patent act, and to amend his petition accordingly;" and where, thereupon, plaintiff filed a motion asking the court to reconsider and vacate said order; and where the plaintiff later in open court amended his petition so as to state his claim in the alternative, for compensation under section 68, title 35, or section 250, title 28, U. S. C. A., rather than under both said sections of the Code, as the petitions were originally drawn; it is held that, aside from the possible difference in character or degree of the proof required (as to which the

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### 85 C.

### PATENTS-Continued.

court expresses no opinion), the claims are not found to be inconsistent in the sense that plaintiff is required to elect whether he will claim compensation for unauthorized use without license or consens under the Act of 1910, as amended, or for compensation for unauthorized use without license or consensition for unauthorized use without license or comment contrary to the written agreement of the compensation of the contrary of the profit of the compensation of the contrary to the profit of the compensation of the contrary to the profit of the contrary to the contra

- 2. United States research patient No. 1,400,472, for "Alriphane Landing Mechanism," held invalid and not infringed by the United States. Hasen C. Pratt, 608.
  XVI. Claims 1, 15, and 16 of the Pratt natest in suit filed.
- July 14, 1922, are readable upon the disclosure of the British patent to Whiteway, No. 132,092, filed October 4, 1918. Id. XVII. The disclosures of claims 2, 3, and 9 of the Pratt
- patent in suit are a combination of Le Meaurier's arm and hook (U. S. No. 1,315,320, filed June 10, 1919) with Whiteway's point of attachment and do not amount to invention. Id. XVIII. Claims 12. 13. and 14 of the Pratt patent in suit.
- involving the use of a universal connection between the plane and the rod, are anticipated by the Whiteway and Le Mesurier patents. Id. XIX. The proof shows that the supposed merit of plaintiff's
- invention, which was the slowing down of a plane while it was still in the air, in order to land it, has not been well regarded by the defendant and plaintiff had not shown that it has been adopted by others. Id.
- XX. The monopoly of a patent does not cover another device, constructed in good faith to operate upon a principle different from that involved in and intended by the patent, merely because it in imposable or impracticable to construct the other device so that it can be operated without indevelop or unakificity, upon occasion, infringing upon the property of t
- to be within the patent. Id.

  XXI. In the instant case it would not be a proper application of the purpose of the patent laws to construe
  plaintiff's assumed patent for a device to retard
  the speed of a plane while still in flight so broadly
  as to prevent the development and use by others
  of a device to stop the roll of a plane after it has
  touched the landing surface. Id.

PATENTS—Continued.

XXII. It is held that all of plaintiff's claims are invalid as

XXII. It is held that all of plaintiff's claims are invalid as having been anticipated. Id.
XXIII. It is held that plaintiff's claim to a device attached in

the rear of the center of gravity and so disposed as to exert a retarding force in approximate fore and aft horizontal alimentent with the center of gravity of the plane, in order to retard the speed of the plane while still in flight, was not infringed by the defendant. If

PAY AND ALLOWANCES.

I. Following the

I. Following the decisions in Butler v. United States, 91 C. Cls. 88, and similar cases cited, it is held that the plaintiff, an officer in the Navy, was retired as of the date fixed in the order of the President and is accordingly entitled to recover. Hisse, 156.

II. Where plaintiff after more than 40 years' survice as a commissioned officer of the Casat Guard was placed on the retired lat January 11, 1924, at which time he was Commandated in the Coast near the contract of the Coast Guard was considered from the contract of the coast of the coast rear admiral (lower half) of the Navy; it is held that plaintiff at the time of the references was entitled under the Act of January 12, 1923 (42 Stat. 1303), and other relevant skeature, to the Santa Table, and other relevant skeature, to the at the time of retirement, and accordingly palantiff as statistical to reverve. Repudads, 100.

is entitled to recover. Regmolds, 180.

III. Where there are two provisions in the same statute
relating to the same matter and the language of
the two provisions gives rise to a doubt, such
doubt will be resolved in favor of the later expres-

sion in the statute. Id.

IV. Section 3 of the Act of January 12, 1923, was a special provision and related to a special clause of officers, which included plaintiff, notwithstanding plaintiff was serving as Commandant of the Ocasa Guard at the time of his retirement, and notwithstanding plaintiff was serving as Commandant, which section 2, except for the training to the retirement of any officer while serving as commandant, which section 2, except for the provisions of section, 3, would have applied to any officer upon reaching 64 years of age whether he had served do years or not. 72.

age whether he had served 40 years or not. Id.

V. The Act of June 9, 1937, amending the first proviso
of section 2 of the Act of January 12, 1923, did
not take away any rights granted to a retiring

# PAY AND ALLOWANCES-Continued.

- officer of the Coast Guard by the Act of 1923, but only granted additional rights. Id.
  - VI. The Act of June 25, 1936, amending section 2 of the Act of January 12, 1923, left unmodified and undisturbed the provisions of section 3 of said 1923 Act. Id.
  - VII. The amendment made by section 2 of the Act of June 9, 1937, to section 3 of the Act of January 12, 1923, did not take away anything that had been previously granted but simply granted additional right to a retiring cantain of the Coast Grant. Id.
  - VIII. Where under the will of plaintiff's father, who died in 1918, all of his estate, including real estate and life insurance proceeds, was devised to decedent's wife and their two sons share and share alike;
    - wife and their two sons share and share alike; and where said estate was never divided and plaintiff and decedent's other son permitted their mother to use and enjoy the entire income from said estate, including the residence and farm; and where, in addition, plaintiff made an allotment monthly from his pay for the support of his mother during the period covered by the claim and counterclaim in the instant suit; and where said allotment and other contributions to his mother by plaintiff constituted a major portion of her support: it is held that plaintiff's contributions to his mother, represented by his interest in the estate income and said allotment, constituted a maintenance of a place of abode for his mother within the meaning of the Act of April 16, 1918. and plaintiff is accordingly entitled to recover. White 400
    - IX. The circumstances disclosed by the record and the contributions made by plaintiff to his moher's support during the periods of the counterclaim show that plaintiff "responded to a needy family condition" within the meaning of the Act of May 26, 1926. Id.
    - X. Where it is shown by the evidence adduced that plaintiff, an unmarried officer of the United States Navy, was in fact the oblet support of his mother; it is keld that plaintiff is entitled to recover rental and subsistence allowances for the years 1937 and 1988, and to date of judgment. Barnes, 411.
  - XI. Where it is shown by the evidence that plaintiff, an officer in the Air Corps Reserve, United States Army, on active duty as Captain, detained to

# PAY AND ALLOWANCES-Continued.

duty with the Civilian Conservation Copps, was not furnished quarters adequate for himself and his dependent mother, or adequate quarters for an officer of his rank without a dependent; it is held that plaintiff is entitled to recover the full amount granted by law, without deductions. Ficklen. 33:

XII. The evidence adduced establishes that plaintiff's mother was in fact dependent upon him for her chief support within the meaning of the applicable statutes. Id.

XIII. Where plaintiff, a lieutenant in the United States Navy, with a dependent mother, while on sea duty was given no allowance as rectal for quasters; it is hadd that plaintiff is entitled to recoves the full rental allowance for an officer of his rank with dependents for the period involved. Agetos, 718.
XIV. Where plaintiff, a lieutenant in the United States

Navy, with a dependent mother, was under the statute entitled to occupy four rooms in Government quarters; and where plaintiff was, however, given only one room for his own occupancy with no allowance; it is held that for the period of such occupancy plaintiff is entitled to recover for the three additional rooms to which was otherwise a decided and at the monitary value fixed by president and a superior of the president of the contract of the superior of the contract o

dential order. 1d.
XV. The long-continued interpretation by administrative officials of an Act, which in the meantime is requacted by the Congress, is evidence of its

PRIOR ART AND USE. See Patents IX, X.

RADIO ANTENNA SYSTEM.
See Patenta VIII, IX, X, XI, XII, XIII.

RADIO EQUIPMENT. See Patents XIV. RECOUPMENT.

See Taxes IX, X, XI, XII, XIII.
RENEWAL OF CONTRACT.

See Contracts XXXI.
RENTAL ALLOWANCE WHILE ON SEA DUTY.

See Pay and Allowances XIII, XIV. RES JUDICATA.

See Taxes XVII, XVIII, XIX, XX, XXI; Indian Claims XXII.

proper construction. Id.

95 C. Cbs.

See Taxen XXVII. XXVIII.

SOCIAL CLUB DUES. See Taxes XVII, XVIII, XIX, XX, XXI, XXII.

SOVEREIGN, DUTY OF. See Indian Claims III.

SPECIAL PROVISION IN STATUTE. See Pay and Allowances IV.

SPECIFICATIONS AMBIGUOUS. See Contracta IV. V.

SPECULATIVE DAMAGES. See Oveters and Oveter Beds IV STATUTE OF LIMITATIONS.

See Tayes I. XIII. SUIT FOR SALARY.

I. Where it is shown by the petition that plaintiff's employment in the Federal Service as a prison guard was first suspended and later completely terminated upon written charges which, so far as that position was concerned, were never vacated or set aside and plaintiff was never restored to that nosition, or advised that he would be so restored, at the salary for which he brings suit: it. is held that the action of the proper Government officials was in accordance with the statute and the regulations of the Civil Service Commission. and is not subject to review by the Court of Claims. Burnay v. United States, 53 C. Cla. 605, 252 U. S. 512, and other cases sited. Roskin.

II. The fact that plaintiff in the instant case was an honorably discharged soldier does not affect the decision. Keim v. United States, 177 U. S. 290. and Medkirk v. United States, 44 C. Cls. 469. cited. Id.

III. Where the Director of Prisons agreed that if plaintiff, then under suspension, would make application for leave without pay, in order that he might apply for transfer to some other Government position; and where such agreement was carried out and such application for transfer was made: it is held that this did not give plaintiff the right to demand the position from which he had been removed or the pay thereof. Id. "SUPPLEMENTAL AGREEMENT" OF 1902.

See Contracts XXIV.

See Indian Claims XII. XIII. XIV. XV. SUPPLEMENTAL AGREEMENTS.

I. Where an office building and its contents, belonging to plaintiff, were destroyed as a result of the flood in the Allegbeny River in 1936; and where the adjacent dam erected on said river in 1927 by defendant and the protective dike erected shortly thereafter by defendant were adequate to protect fully the adjacent property, including the property of plaintiff, against any flood that had ever been known in that area; it is held that the construction of said dam in 1927 and other acts connected therewith did not constitute a taking of plaintiff's property by the Government within the meaning of the Fifth Amendment to the Constitution and that whatever damage was caused to plaintiff's property at the time of said flood by reason of the presence of the dam in the river was consequential in its nature, for which the Government cannot be required to respond in

- damages. Braeburn Alloy Steel Corp., 343. II. There is a marked distinction between a taking for public use, for which just compensation must be paid, and mere resulting damage. Bedford v. United States, 192 U. S. 217: Marret, Administrator, et al. v. United States, 82 C. Cls. 1; 299 U. S. 545 cited. Id.
- III. Where, in the making of improvements by the Government within the legal limits of a navigable stream there is some incidental or consequential damage resulting to the owner of private property, there is no taking of such property by the Government and hence no liability. Sanguinetti v. United States, 264 U. S. 146: Danforth v. United States, 308 U. S. 271; Marret, Admn. et al. v. United States, 82 C. Cls. 1: 299 U. S. 545 cited.
- IV. The Government is not an insurer of rinarian owners against damages resulting from floods. Id.
  - V. United States v. Lynah, 188 U. S. 445. and United States v. Cress, 243 U. S. 316, representing the greatest lengths to which courts have gone in permitting recovery in cases similar to the instant
- suit, are distinguished. Id. VI. Where plaintiffs were the owners of a tract of land in the State of Illinois, lying between the Illinois-Michigan Canal and the Des Plaines River. abutting on the Jefferson Street bridge and extending from the western end of said bridge northward

# TAKING OF PRIVATE PROPERTY-Continued.

and where plaintiffs' predecessors in ownership had erected on said land a foundation, in contemplation of building a three-story structure, the first floor at the water level for a warehouse, the second floor at the level of the bridge for a store, and the third floor for a dwelling; and where said building planued in 1913 was abandoned; and where the United States Government in 1930 undertook to complete a deep waterway between Locknort, Ill., and a point on the Illinois River near Uties, Ill., which the State of Illinois had begun in or about 1919; and where after (but not before) the United States Government undertook to complete said project, the level of the water was raised and plaintiffs' land was permanently submerged; it is held that plaintiffs are entitled to recover. Dooner.

et al., 392.

VII. The valuation of property taken for public purposes is not an exact mathematical process. Id.

See also Dredging of Navigable Channel, I. II.

TAXES.

I. (1) Where the Commissioner of Internal Revenue on September 9, 1929, transmitted a letter to Salmon

Realty Corporation and its affiliated corporations. including the plaintiff, setting forth the Commissioner's determination of the tax liability of the affiliated group for the calendar year 1924; and where said statement agreed with the statement of liability submitted on July 19, 1929, by plaintiff: and where, thereafter, by letter dated September 11, 1931, the Commissioner advised Salmon Realty Corporation and its various affiliated corporations, including the plaintiff, that the refund of certain of the oversasessments set forth in said letter of September 9, 1929, was barred by the statute of limitations, it is held that the statute of limitations had run against the refund payments made by plaintiff on March 13, 1925, and on June 15, 1925, but it had not run as to payment. made on September 14, 1925. Midwint Realty Company, Inc., 63.

Company, Inc., 63.

II. (2) It is held that there was an implied promise on the part of the Commissioner to refund the payments made on Sentember 14, 1925, against which the

### Income Taxes—Continued.

statute of limitations had not run and the plaintiff is accordingly entitled to recover, under the provisions of section 281 (a) of the Revenue Act of 1924 and section 284 (a) of the Revenue Act of 1926. Ed.

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- III. (3) The facts support the allegation that there was an implied promise to pay on the part of the Commissioner; and plaintiff, having sued on this implied contract within 6 years, is entitled to recover. Id.
  - IV. (4) Where plaintiff in 1922 owned 20 shares of the capital stock of a corporation and was the sole beneficiary of a trust, under his father's will, which owned 122 shares of said stock; and where eaid shares, along with the balance of the majority stock of said corporation were sold in 1922 at a price in excess of the income tax base value of said shares; and where the purchase price of said majority stock was paid partly in cash and partly in notes, and distribution of the cash was made proportionately to plaintiff and said trust and the other majority stockholders; and where the transaction became involved in litigation instituted by minority stockholders, such litigation resulting adversely to plaintiff and the other majority stockholders, including said trust, and where in said litigation judgments were obtained against. and subsequently paid by, plaintiff and said trust; it is held that the proceeds of said sale, in cash and notes, constituted income for tax purposes in
    - V. (5) When taxayer made returns for the year 1922 on a cash basis; and where the sale of stock made in that year was pursuant to a contract, executed in 1927, which contained warrantee with respect to the financial condition of the conpression and covenants binding the seller not to engage in competition with buyer, as well as excella robustions to the contract of the contract of the conpetition with buyer, as well as excella robustions in it is hadd that such warranties and covenants did not keep the transaction includes and secondary.
  - said sale was a completed sale in 1922. Id.

    VI. (6) Where in the sale of said majority stock, for each
    and notes, said cash and notes in 1922 came into
    the hands of the agent, or trustee, for said majority
    stockholders: and where only the cash was

### Income Taxes-Continued. distributed to said stockholders, including plain-

tiff and the trust of which plaintiff was sole beneficiary: it is held that said notes had a "readily realisable market value" within the meaning of section 202 (a) (3) (c) of the Revenue Act of 1921 and the pertinent Treasury Regulations. and constituted taxable income to plaintiff for his proportionate share, including his proportionate share of the notes in the hands of his ament or trustee. Id.

417, cited. See also McDuffe, Trustee, v. United

VII. (7) Where the right of plaintiff, as well as the right of other majority stockholders, including the trust of which plaintiff was the sole beneficiary, to retain all the proceeds of the sale of their stock was attacked in litigation beginning in 1922, and was concluded adversely to them some years later; it is held that, under the authorities, this fact did not postpone plaintiff's tax liability until the outcome of said litigation was known. North American Oil Consolidated v. Burnett, 286 U. S.

States, 85 C. Cln. 212: Schromm v. United States 93 C. Cla. 181. Id. VIII (8) Where as a result of hearings held from August 25. to October 6, 1930, it was known to the duly authorized representatives of the Government, including the Collector of Internal Revenue, that certain funds in cash in a safe deposit box and on deposit in a bank were held by one Reese B. Brown

in trust for the use and benefit of plaintiff's decedent, Sarah E. Smith; and where during said hearings it was not disclosed to said Sarah E. Smith that the collector upon a warrant of distraint against said Brown had previously seized and impounded the then unknown contents of said safe deposit box and the said funds on deposit on August 7, 1930; and where, thereafter, in November 1930 the collector withdrew and took possession of the said funds in said safe deposit box and on deposit, and deposited the total of these amounts to his credit as collector; and where after a determination of deficiency against said Brown and Sarah E. Smith, and a jeopardy assessment against Brown but not against Sarah E. Smith. and upon an appeal to the Board of Tax Appeals.

while the said funds were being held as stated by 449978-42-CC-vol. 95-88

Income Taxes—Continued.

said collector, stipulations were filed and a decision made by said Board on October 12, 1933, and thersupon, on or shortly after October 12, 1933. said collector collected and satisfied the deficiency determined against Brown as well as the deficiency against Sarah E. Smith from the trust funds so held as stated, which said funds were for the use and benefit of said Sarah E. Smith, whose death had occurred on July 24, 1932; it is held that the claim of the estate of said Sarah E. Smith against the defendant had not accrued in a shape to be effectually enforced until said trust funds had been applied, as stated, and covered into the Tressury of the United States on October 12, 1933. and the petition in the instant case, filed in the Court of Claims on September 16, 1939, was accordingly timely filed within the meaning of section 252, U. S. Code, title 28, Tucker, Adm., 415,

- IX. (9) Where under the will of decedent, the trustees of the estate, of which plaintiff was a beneficiary, and which consisted of lesseholds and other property. distributed to the beneficiaries, including plaintiff. the net income without deduction for depreciation. obsolescence, or amortisation; and where in 1932 the trustees, in accordance with a trust provision conferring such discretion, sold said lesseholds and distributed to the then beneficiaries the entire seeds Including undistributed income and authority to receive future payments on the sale of said leaseholds; and where in computing for tax purposes the profits from said sale in 1932 the Commissioner of Internal Revenue reduced the 1913 basis of value by the amount of the depreciation on the buildings and amortization of the leases from March 1, 1913, to the date of sale; and where depreciation and amortization had not been allowed in assessing income taxes for the years prior to 1929; it is held that under the provisions of the Revenue
- held. Hall, 539.

  X. (10) It is held that plaintiff is not entitled, under the common law doctrine of recoupment, to recoupalleged overpayment of income taxes for the years misor to 1929, during which deuteristin was not

Acts of 1928 and 1932 such deductions were properly considered in computing gains on the sale made in 1932 and the Commissioner properly so

Income Taxes-Continued.

allowed, against income taxes for the years 1932 to 1935, inclusive, during which depreciation on the property for the years prior to 1929 was considered in fixing the basis of value on the leasehold property which was held in 1932. Bull.

Executor, v. United States, 295 U. S. 247, distingwished. Id.

XI. (11) Where plaintiff did not at any time file a claim for refund of alleged overpayment of taxes for the years prior to 1929, and where plaintiff under the statutes had the privilege of filing such claim and in case of rejection to file timely suit therefor: and where if plaintiff had the right to an allowance for depreciation in said years such right could have been established; it is held that under sections 608

and 609 of the Revenue Act of 1928 plaintiff is not entitled to recover by way of recoupment. Id. XII. (12) If the right to a refund could not have been established under the statutes in effect prior to 1929, plaintiff cannot properly claim recoupment later.

XIII. (13) Limitation statutes are enacted for the benefit of the taxpayer as well as the Government. Id.

Capital Stock Tax. XIV. (1) Where the plaintiff, a Louisiana corporation, filed a

capital stock tax return for the year ended June 30. 1934, reporting \$720,000 as the value of its entire capital stock and showing no tax liability and claiming exemption from the capital stock tax on the ground that it was a non-operating holding company not carrying on or doing any business during any part of the taxable year; and where plaintiff filed a similar return for the year 1935. reporting \$733.412.75 as the value of its entire espital stock and a tax liability of \$733, and claiming exemption likewise on the above-stated grounds; and where, on March 14, 1936, plaintiff filed its so-called "amended" capital stock tax return for the year 1934 reporting a nominal sum

of one dollar as the value of its entire capital stock: and where there is no evidence in the record to show that the plaintiff was not engaged in carrying on or doing business during the years in question, which is the essential basis of the levy and assessment of the tax: it is held to be presumed

### Capital Stock Tax-Continued.

- that business was carried on by it and that it was accordingly subject to the tax. Merrison Cafeteriga, 151.
  - XV. (2) The documents filed by plaintiff on regulation forms were either returns within the meaning of the law or were something not required by the law; there is no such classification as "no tax returns" or "exemption" returns. Id.
  - XVI. (3) The so-called corrected or "amended" return, which was filed long after the due date of a return for either of the years in question, was not a "first" return within the meaning of the statutes. Id. Excise Tax.

- XVII. (1) Where under a decision of a District Court of the United States it was held that the plaintiff club was not a social club and hence that the dues and initiation fees of its members were not taxable under Section 501, Revenue Act of 1928, as amended; it is held that the question whether or not the plaintiff was a social club during the period in question in the instant suit, was not res judiouts by reason of said District Court decision. Enpringers' Club. 42.
- XVIII. (2) A judgment in a suit against a collector of internal revenue for refund of taxes paid is not res judicata in a later suit against the Commissioner of Internal Revenue or the United States because of a lack of identity of parties. Bankers Pocohantas Coal Co. v. Burnet, Commissioner, 287 U. S. 308, cited.
  - Id. XIX. (3) Where the parties to a suit in a District Court of the United States and the parties in the instant suit are identical but where the facts are not identical, involving different though similar sets of events; it is held that the judgment of the said District Court is not res judicate. Toit v. Western.
  - XX. (4) Where plaintiff's activities in the period in question in the instant case were not those of an earlier period, previously litigated, though comparable and similar, the court may not close its eyes and minds to the facts actually before the court and give to plaintiff a judgment which the pourt would not give to any other plaintiff

Maryland Rv. Co., 289 U. S. 620, distinguished,

whose cause of action had equal merit. Id.

TAXES—Continued Excise Tax-Continued.

XXI. (5) The doctrine of res judicata should not be so ex-

tended. Id.

XXII. (6) Where it is found, upon the evidence, that plaintiff's operations for the period in question in the

instant suit, July 1935 to January 1938, were for

tax purposes those of a social club, it is held that the excise taxes on the dues and initiation fees of plaintiff's members were properly collected, under Section 501 of the Revenue Act of 1926 as amended III. S. Code, title 26, Sections 950, 951, 952), and

plaintiff is not entitled to recover. Id. XXIII. (7) Where the plaintiff sold and delivered cigarette lighters and dispensers, which were mechanical devices for automatically segregating, lighting,

and electing eigarettee from a container, and which were supplied with a removable bracket for the purpose of being attached to the steering post of an automobile; and where said device was advertised as a safety device which would enable a smoker driving a car to obtain a lighted cigarette without taking his eyes from the road; it is held that the device, although it could be attached to a table or desk without change or variation of its basic mechanics, was primarily adapted for use in motor vehicles, that it was so intended to be used. and that accordingly it was taxable as an automobile accessory under the provisions of section 606 (c) of the Revenue Act of 1932, as extended,

and plaintiff is accordingly not entitled to recover. Masterbilt Products Corp., 451. XXIV. (8) Articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such

vehicles, even though there has been some other use of the articles for which they are not so well adapted. Universal Battery Co. v. United States. 281 U. S. 580, 584, Id.

XXV. (9) Where it is established by the evidence that the soan manufactured by the plaintiff and sold under the name "Queen Lily" might be used for tollet purposes but its predominant use is as a laundry sosp; and where it was manufactured for use as a laundry soap only and advertised and sold as such; it is held that the sale of said soan is not taxable under section 603 of the Revenue Act of 1932 and

### TAXES—Continued. Excise Tax—Continued.

plaintiff is accordingly entitled to recover. Flash Chemical Co. v. United States, 87 C. Cla. 350,

cited. Id.

XXVII. (11) Where the plaintiff operated a refrigerating system

in the City of St. Louis, utilizing electrical energy in the operation of said system; and where plaintiff's business consisted of (1) the manufacture and sale of ice; (2) the manufacture, distribution, and sale of refrigeration through pipe lines. the refrigeration being used for cold-storage boxes of produce dealers, for drinking water, for the sir of buildings and other needed purposes, and (3) the refrigeration of plaintiff's warehouses located in various parts of St. Louis in which were stored many kinds of perishable commodities: it is held that the business of plaintiff is predominstely "commercial" in its nature within the meaning of section 616 (a) of the Revenue Act of 1932, levving a tax of 3 per centum of the amount paid for electrical energy for domestic or commercial consumption, and plaintiff is accordingly not entitled to recover. St. Louis Refrigerating & Cold Storage Co., 894.

XXVIII. (12) The statute does not recognise a twilight zone between "commerce" and "industry." Id. XXIX. (13) Treasury Regulations may not serve to change the

provisions of a statute. Id. XXX. (14) It would be illogical to hold that the Government

would be bound by Treasury Regulations construct by the Commissioner of Internal Revokes as limiting the application of the taxing statutes as expressed in the regulations and at the actions and time to disregard the Commissioner's interpretation of those limits. Id.

TAX "RETURNS". See Taxes XV.

TITLE, RECOGNITION OF. See Indian Claims VIII.

TITLE 28, SECTION 250, U. S. CODE. See Jurisdiction.

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See Taxes XXV, XXVI. TREASURY REGULATIONS.

See Taxes XXIX, XXX.

TREATY OF 1854. See Indian Claims XVI, XVII. TREATY OF JUNE 11, 1855.

See Indian Claims I. II. IV. TREATY OF JUNE 25, 1855.

See Indian Claims X.

TREATY OF JUNE 9, 1863. See Indian Claims I. VII.

TREATY OF JUNE 30, 1863.

See Indian Claims XXIII, XXIV, XXV, XXVI, XXVIII. TREATY OF NOVEMBER 15, 1865.

See Indian Claims X. TREATY OF 1866.

See Indian Claims XIII, XIV. TREATY OF 1868.

See Indian Claims XI. TRIBAL CHIEF, AUTHORITY OF,

See Indian Claims V.

TRIBAL LANDS. See Indian Claims XII, XIII, XIV, XV.

TRIBE, ACTION OF. See Indian Claims VII

UNFORESEEN CONDITIONS. See Contracts III.

VALIDITY.

See Patents III. V. VI. VII. VIII. X. XI. XII. XV, XVI. XXII. WARRANTIES AND COVENANTS.

See Taxes V.







